Supreme Court, U.S.
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In The

Supreme Court of the United States

T H INVESTMENTS, INC.,

Petitioner,

v.

KIRBY INLAND MARINE LP and
PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. May a state agency avoid the obligation to pay just compensation required by the Fifth and Fourteenth Amendments to the United States Constitution when private property is taken by it, by enlisting the judicial power of the State to declare the owner's rights extinguished as a matter of law.

2. In the alternative, if a state agency may in some cases avoid the obligation of paying just compensation for a taking of private property, must a court evaluate considerations of due process fairness in light of the circumstances before divesting the owner of that property.

LIST OF PARTIES AND RULE 29.6 STATEMENT

The petitioner T H Investments, Inc. is privately owned. Respondent Kirby Inland Marine is a wholly-owned subsidiary of Kirby Corporation. Kirby Corporation is a publicly-traded entity. Respondent Port of Houston Authority of Harris County, Texas is a political subdivision of the State of Texas.

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PETITION FOR WRIT OF CERTIORARI

T H Investments, Inc. respectfully petitions for a Writ of Certiorari to review the judgment and opinion of the Supreme Court of Texas.

OPINIONS BELOW

The order of the Supreme Court of Texas denying rehearing is unpublished and is reprinted in the Appendix to the petition ("App.") at App. 106. The Judgment and Opinion of the Fourteenth Court of Appeals is published at 218 S.W.3d 173 and is reprinted at App. 1. The Final Judgment and Findings of Fact and Conclusions of Law of the District Court of Harris County, Texas, 269th Judicial District are unpublished and are reprinted at App. 81 and App. 88.

STATEMENT OF JURISDICTION

The Supreme Court of Texas denied rehearing on May 30, 2008. The Court has jurisdiction under 28 U.S.C. § 1257(a).

STATUTES INVOLVED

This case involves provisions of Texas law and constitutional law. The pertinent provisions are:

The Fifth Amendment to the Constitution of the United States (App. 107).

The Fourteenth Amendment to the Constitution of the United States (App. 107).

The Act of April 5, 1927, 40th Leg., R. S., ch. 292, 1927 Tex. Gen. Laws 437, 438 (App. 109).

Section 11.012 of the Texas Natural Resources Code (App. 115).

Section 61.115 of the Texas Water Code (App. 116).

Section 61.161 of the Texas Water Code (App. 117).

Section 62.106 of the Texas Water Code (App. 117).

Section 62.107 of the Texas Water Code (App. 118).

STATEMENT OF THE CASE

A. Introduction

The Port of Houston Authority of Harris County, Texas ("Port" or "Port Authority"), a political subdivision of the State of Texas, confiscated approximately

twenty-seven acres of valuable commercial property from its owner, T H Investments, Inc. ("THI") without exercising its power of eminent domain and without paying any compensation. Instead, the Port sought and obtained a judicial decree from the courts of Texas holding that the land purchased by THI and the rights that accrued with it never existed because the land was shallowly submerged by the tidal waters of the Old River and the San Jacinto River. This land was mostly (but not entirely) submerged when THI bought it and had been in commercial use in this condition as a barge fleeting (parking) area for decades before THI's purchase. Prior to THI's purchase, ownership of these twenty-seven submerged or partially submerged acres passed several times. The land was, and still is, a barge fleeting area capable of producing revenue. The judicial decree procured from the courts by the Port Authority has deprived THI of a beneficial return on its investment.

This taking of THI's property without compensation by the Texas courts is prohibited by the Fifth and Fourteenth Amendments to the Constitution of the United States.

Even if the taking might be permissible under some circumstances, the Texas courts in this case further extinguished THI's rights under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States by not assessing the reasonableness or fairness of the confiscation by the Port Authority under the circumstances presented here.

B. Background

In October 2002, THI purchased two tracts of land by deed on the eastern tip of Carter-Kirby Island. Tract 1, consisting of approximately twenty-seven acres, was acquired by non-warranty deed and Tract 2, consisting of 6.33 acres, was acquired by quitclaim deed. Only Tract 1 is at issue in this Petition. At the time of THI's purchase, the Tract 1 property was almost entirely submerged to a depth of up to 1.7 feet below the waters of Old River which flowed to the north and the San Jacinto River to the south near Houston, Texas. App. 37. The land is not in the Houston Ship Channel although both Old River and the San Jacinto River are navigable and flow out to the Gulf of Mexico.[1] At times during low tide and a strong north wind, Tract 1 is mostly dry land. A small part of Tract 1 called "the little thumb" is dry land all the time. An area of deeper water called the "Big Empty" lay immediately off shore to the east.

THI bought the property from sellers known as the Carter heirs. The Carter heirs leased Tract 1 beginning in October 1978, to Kirby Inland Marine's ("Kirby") predecessor and Kirby used it to fleet barges in the Big Empty. Kirby paid monthly rent to the Carter heirs for the use of the submerged shoreline of Tract 1. App. 5. When THI purchased the property,

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[1] The water flowing in the two tracts is considered navigable as a matter of Texas law whether or not it is navigable in fact. App. 13, App. 96. In fact, it is too shallow to be navigable.

the Carter heirs assigned the lease to THI. THI intended to continue this commercially viable use and considered developing its own barge fleeting business at the site. THI met several times with the Port as well as the U.S. Army Corps of Engineers to explain their plans to develop and reclaim the site. The Port had no objection to THI's plans to develop and reclaim the site and recommended who THI should hire for the necessary engineering work. Nor did the Army Corps object to THI's purchase or proposed use of the land. The site is not far from the Houston Ship Channel and therefore is a convenient site for this use.

Carter-Kirby Island was patented to private ownership by the sovereign in 1845, as part of a larger tract of land called the J.T. Harrell grant. App. 19, 53. At the time, the Island was comprised of 730.6 acres of dry land. Subsidence of the Island including Tract 1 began in the early twentieth century, starting around 1906. The chain of title established that Tract 1 had been transferred numerous times since it became mostly submerged. In 1952, Mary Niedermeier, a predecessor in title to Tract 1, transferred a 50% interest in the parcel in its partially submerged condition to the Port Authority. App. 56. In 1954, the Port conveyed the interest back to Ms. Niedermeier in a partially submerged state, but the Port also warranted by deed that this conveyance "does hereby bind [the Port], its successors and assigns to warrant and forever defend, all and singular, the said property and premises unto said Grantee [Niedermeier], her heirs, executors, administrators, successors and

assigns against every person whomsoever lawfully claiming or to claim the same or any part thereof by, through or under it but no further." Port/Niedermeier deed at 3.

The Carter heirs became owner of a one-half interest in Carter-Kirby Island including Tract 1 in 1915, and acquired the remainder in 1963. The rest of Carter-Kirby Island south of Tract 1 also was mostly submerged, and in 1979, the Port Authority and the Carter heirs settled a condemnation action brought by the Port which sought to use the remainder of the Island as a place to deposit dredging spoil. The Port condemned the land and paid for it for this purpose. Nothing in the record distinguishes Tract 1 from the rest of Carter-Kirby Island. Both tracts are adjacent to each other, both are bounded by the same rivers and both are mostly submerged by shallow water most of the time.

When THI bought Tract 1 from the Carter heirs, there were a number of precedents under Texas law recognizing private ownership rights in submerged land. *See, e.g., Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976) (acknowledging private ownership rights in submerged property within the same river system and downstream from Tract 1 toward the Gulf of Mexico); *see also City of Galveston v. Menard*, 23 Tex. 349 (1859). App. 17, 40-42.

Upon taking possession of Tract 1, THI became the successor to the Carter heirs' leasehold rights with Kirby. THI then notified Kirby, which had a

month-to-month lease at the time, to vacate the barge fleeting area and remove any improvements placed there by Kirby or commence payment of $35,000 per month for any continued occupancy or use. Kirby had been paying $1,000 per month under the lease for the preceding ten years. App. 5. Kirby refused these terms and THI then terminated the lease and notified Kirby of an intent to evict it from the area.

Kirby sued THI in the District Court of Harris County, Texas, 269th Judicial District seeking to enjoin THI's interference with Kirby's business operations and to obtain a declaration that the Port Authority, not THI, was the legal owner of Tract 1. The Port Authority joined the suit to establish its ownership of Tract 1, not by virtue of eminent domain, but on the theory that Texas water rights law conferred ownership of all of Tract 1, submerged or not, on the Port Authority as a matter of law. THI then filed counterclaims and cross-claims for trespass and to try title on Tracts 1 and 2.

C. The Decision Below

The principal non-constitutional issue presented below was whether the submergence of Tract 1 retroactively extinguished THI's ownership rights in the property. Although the Port Authority previously had exercised its eminent domain powers to acquire most of the rest of Carter-Kirby Island, thus recognizing the Carter heirs' ownership rights, the geomorphology

of the Island was and remains indistinguishable from that of Tract 1. At no time before joining Kirby's lawsuit did the Port Authority take any action suggesting opposition to the private ownership of Tract 1 in its submerged state. This time, however, the Port Authority together with the lessee whose leasehold rights were endangered, decided to pursue a more audacious objective. This time, the Port set out to acquire the property without paying for it.

In *York*, the Texas Supreme Court held that ownership of submerged lands is permissible under Texas water rights law and that the riparian land[2] submerged below the mean high tide line in that case could not be allocated to public ownership without compensation because the land became submerged as a result of unforeseeable subsidence. *York*, 532 S.W.2d 949. Subsidence in this context occurs when land is compacted by natural or man-caused changes in substrata areas below the surface. According to the evidence, Tract 1 and all of Carter-Kirby Island slowly subsided over the years as municipalities and industry withdrew underground water and hydrocarbons. The Port's expert witness in this case estimated "about 8 feet" of subsidence at the location of Tract 1. THI's expert calculated that "but for" man-made subsidence, Tract 1 would not be submerged today.

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[2] Riparian land is generally considered the banks and shoreline of a river or stream. *Brainard v. State*, 12 S.W.3d 6, 15 n.2 (Tex. 1999). "Littoral" property is bounded by an ocean, sea or lake. *Id.* at 21 n.7.

App. 36. Other natural forces influenced the current status of Tract 1 as well, including erosion, accretion, tidal effects of sunken barges and reliction.[3]

There was a dispute below over whether the submergence of Tract 1 was due mostly to subsidence or whether other factors had a similarly important influence. The trial court concluded and the court of appeals agreed that any erosion on Tract 1, even on the outer tip, trumps subsidence and results in a total loss of the entire tract, thus taking the case out of the *York* rule that private riparian land submerged by subsidence is not lost to the State. App. 100, App. 20-40. The appellate court relied upon the Texas Legislature's 1927 conveyance to the Port Authority's predecessor agency of the duty to administer the Harris County river system including the San Jacinto and Old Rivers "and all other tidal flats or overflow land adjacent to or appurtenant to the above mentioned streams," "for public purposes and the development of commerce only." App. 11-13, 111.[4] The court of appeals

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[3] Accretion is the building up of shoreline by the flow of water and deposition of waterborne soil. Reliction is the building up of submerged land by tidal or fluvial activity. App. 15; *see also City of Port Isabel v. Mo. Pac. R. Co.*, 729 S.W.2d 939, 942 (Tex. App. – Corpus Christi 1987).

[4] The 1927 Act, however, also stated that the statute "shall not affect, curtail or abridge the rights of riparian owners of lands abutting upon the islands and land subject to overflow, and lands lying under the streams, bays and lakes herein described. . . ." App. 113-14.

held that Tract 1, under Texas law, was the property of Texas when THI bought it, and remained so, and that THI never had an enforceable right, title or interest in the property notwithstanding any other consideration.

The 1927 Act, which is the principal source of statutory law cited in support of the appeal court's holding, does not dictate the precise outcome reached in this case, nor does it absolve the Port Authority from paying fair compensation for land it acquires or elects to acquire[5] that arguably falls with its jurisdiction in the future over the passage of time. The outcome in this case is solely a consequence of Texas jurisprudence and not choices made by the Texas Legislature.[6]

Although there were several factual disputes over boundaries and the location of erosion versus the

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[5] It is obvious that the Port Authority has choices since it condemned and paid for the rest of Carter-Kirby Island in a submerged state and did nothing to assert its rights to Tract 1 over the half century or more that it was submerged in part and was leased by its owner to third parties.

[6] The main cases outlining the evolution of Texas water rights law in this context are *Luttes v. State*, 324 S.W.2d 167 (1958), *Rudder v. Ponder*, 293 S.W.2d 736 (1956), *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410 (1943), and *Brainard*, 12 S.W.3d 6 (all involving littoral not riparian land). Although other Texas cases recognize an owner's rights in submerged land, it is apparent that the Court of Appeals here did not think those decisions reflected good law or deemed them factually distinguishable. App. 17.

degree of subsidence and whether Tract 1 ever became a part of the bed of either river, the court of appeals resolved all of these disputes principally as a matter of law by relying on judicial interpretations of the 1927 Act and Texas common law of riparian rights. No set of facts would have mattered to the Court of Appeals if there was some erosion that was even minimally responsible for the submergence of Tract 1.[7]

Turning to THI's due process and takings arguments, in the trial court, the Port moved for judgment in its favor after trial. THI objected on various grounds including Texas and federal constitutional arguments that the Port's motion, if granted, would constitute an unconstitutional uncompensated taking. The objections were overruled by the trial court without opinion.

THI pressed the constitutional arguments to the court of appeals where they were similarly rejected. The court observed that the "possibilities of loss of land from processes such as erosion are limitations on ownership rights of the State and private land owners along riparian or littoral boundaries [citation omitted]." App. 43. According to the court of appeals, "the trial court likewise recognized and applied these

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[7] Erosion is, of course, inevitable along river banks and the court distinguished *York* from THI's case noting that no one raised the issue in *York*, the parties having agreed that the sinking of the land in that case was due only to subsidence. App. 24.

limitations and its order does not effect an unlawful confiscation of THI's property. Nothing in *Lucas [v. South Carolina Coastal Council*, 505 U.S. 1003 (1992)] is inconsistent with this result." App. 44.

The court of appeals did not address the fact that THI purchased the property in a submerged state and sought only to continue the open commercial use to which it had been put for decades.

The area of dry land called the little thumb that was purchased as a part of Tract 1 was confiscated as well on the theory that its existence was caused by dredging and the natural accretion of soil near sunken barges, and thus was the product of self-help albeit self-help by someone other than THI. Texas law does not allow a riparian or littoral owner to reclaim sunken land and thus take ownership of it by self-help. App. 49, *citing Brainard*, 12 S.W.3d at 19.

The Supreme Court of Texas denied review and rehearing. App. 106.

REASONS WHY THE WRIT OF CERTIORARI SHOULD BE GRANTED

A. This case presents an important question of constitutional law concerning the right of the State to confiscate valuable property without paying just compensation as required by the Takings and Due

Process Clauses of the Fifth and Fourteenth Amendments to the Constitution of the United States.[8]

The right of the Port Authority to condemn Tract 1 by exercising its power of eminent domain and paying just compensation is not in question here. The question here is whether the Texas courts may accomplish what the Port Authority may not do, by decreeing that the property rights in Tract 1 acquired by THI never existed and that THI cannot enjoy those rights, profit from them or be compensated for their loss.

In 1897, this Court held:

> In our opinion, a judgment of a state court, even if it be authorized by statute, whereby private property is taken for the State or under its direction for public use, without compensation made or secured to the owner, is, upon principle and authority, wanting in the due process of law required by the Fourteenth Amendment of the Constitution of the United States, and the affirmance of such judgment by the high court of the State is a denial by the State of a right secured to the owner by that instrument.

Chicago Burlington & Quincy R. Co., 166 U.S. at 241.

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[8] It has long been established that the Takings Clause of the Fifth Amendment applies with equal force to the states through the Fourteenth Amendment. *Chicago Burlington & Quincy R. Co. v. City of Chicago*, 166 U.S. 226 (1897).

The seeming clarity of this holding has been confounded over the intervening years by jurisprudence that is more cautious and reflects concern over the proper scope of judicial power, the inability of the judiciary to pay compensation to property owners faced with a judicial nullification of their property rights, and the inherent anomaly presented by the possibility that courts which have no police powers, but not legislators or a state's executive branch can confiscate property in violation of fundamental constitutional rights without providing for appropriate restitution. It is a poor and thin justification to suggest that courts may resolve this dilemma by holding that certain property rights were lost or never existed. This is small consolation to the owner, who honestly acquired those rights and enjoyed them for a time until being informed that they never existed. This analysis is not compatible with the principles embodied in the theory and practice of due process of law.

This dilemma is, perhaps, less easily resolved today than it once was. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990); Roderick E. Walston, *The Constitution and Property, Due Process, Regulatory Takings and Judicial Takings*, 2001 UTAH L. REV. 379 (2001). Commentators acknowledge two possibly incompatible lines of authority concerning the applicability of constitutional takings and just compensation jurisprudence to a judicial nullification of property rights. Over the years, some of this Court's decisions suggest that

state judicial authority to overrule prior decisions or to announce new law is incompatible with the notion that by doing so federal constitutional guarantees may be abridged. *See Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 680-81 & n.8 (1930), *Tidal Oil Co. v. Flanagan*, 263 U.S. 444, 450-51 (1924). Similarly, in *Great N. R. Co. v. Sunburst Co.*, 287 U.S. 358, 366-67 (1932), Justice Cardozo seems to embrace the fiction that property rights that may be lost as a consequence of a judicial decision never existed and thus cannot fall within the protection of the Takings Clause.

Other authorities offer a different approach. Textually, neither the Fifth nor the Fourteenth Amendments contemplate an exception for a judicially sponsored deprivation of property rights. *See* App. 107-08. Both constitutional sources prohibit the transfer of property from private to public use or ownership without benefit of both due process of law and just compensation. Neither amendment makes an exception for a judicially mandated deprivation, even if the culprit is more typically the legislature or the regulator.

Chicago Burlington & Quincy R. Co. also acknowledges the potential due process defect in a state court judgment having the effect of taking private property for public use without compensation. 166 U.S. at 233-34, 241. ("But it must be observed that the prohibition of the [Fourteenth] amendment refers to all the instrumentalities of the State – to its legislature, executive, and judicial authorities – and

therefore whoever, by virtue of public position under a State government, deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition, and, as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State.'"). *See also Muhlker v. New York & Harlem R. Co.*, 197 U.S. 544, 570-71 (1905) (holding that the state judiciary has no more power to violate the Contracts Clause and deprive a litigant of property with impunity than does any other state actor); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74, 82-84, 88 (1980) (implying that the Takings Clause applies to judicial deprivations of property but treating it as more so a legislative act in that case). More recently, in a concurring opinion, Justice Stewart in *Hughes v. State of Washington*, 389 U.S. 290, 296-97 (1967), observed:

> Although the State in this case made no attempt to take the accreted lands by eminent domain, it achieved the same result by effecting a retroactive transformation of private into public property – without paying for the privilege of doing so. Because the Due Process Clause of the Fourteenth Amendment forbids such confiscation by a State, no less through its courts than through its legislature, and no less when a taking is unintended than when it is deliberate, I join in reversing the judgment.

Justice Stewart commented also upon the "no rights" fiction that provides a foundation for the

theory adhered to in THI's case by the court of appeals "for a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Id.*, 389 U.S. at 296-97. *See also Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Justices Scalia and O'Connor dissenting from a denial of the petition for certiorari) ("No more by judicial decree than by legislative fiat may a state transfer private property into public property without compensation [citation omitted]").

In a case that is analogous to the one presented here, the Ninth Circuit refused to condone a state-sponsored judicial taking of property without compensation. *Robinson v. Ariyoshi*, 753 F.2d 1468, 1473 (9th Cir. 1985) ("The state conceded on oral argument that the Fourteenth Amendment would require it to pay just compensation if it attempted to take vested private rights. The substantive question, therefore, is whether the state can declare, by court decision, that the water rights in this case have not vested. The short answer is no.").

The authorities cited in this discussion reveal a lack of consistency in interpretation and fundamental disagreements over the constitutional scope of a judicially assisted or sponsored taking of private

property for public use without compensation.[9] The "no rights" fiction embraced by Justice Cardozo in *Great Northern* and criticized by Justice Stewart in *Hughes*, and Justices Scalia and O'Connor in *Stevens* is viable today in Texas, at least. The fiction lacks a solid constitutional foundation and should be evaluated by this Court.

B. This case is an appropriate vehicle for revisiting the discussion. THI's property interest in Tract 1 in its submerged state was recognized for decades by the Port Authority and everyone else, including Kirby which paid rent to lease the property from the Carter heirs for more than ten years. Property that was identical in character comprising the remainder of Carter-Kirby Island was taken by the Port using its eminent domain powers. Fair compensation was paid by the Port for the taking. The property has undeniable commercial value and was purchased by THI solely for that reason. Deeds were filed and recorded, property taxes were paid, and the parties believed at all times that Tract 1 was fully vested with the full

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[9] Although the Public Use doctrine has not been discussed here, the Port Authority has not articulated any public use intended for Tract 1 and THI believes it still is used for Kirby's barge fleeting operations. Presumably, the maintenance of the Harris County and Houston river system is sufficient purpose to meet the requirement of the Public Use Clause, but it is not clear that even this rationale is truly implicated in this case. The public does not obviously benefit more or less depending upon which company fleets barges in the Big Empty, or depending upon whether the Port or a private owner is the lessor.

range of characteristics of privately owned land. Neither does the property have any identified public value nor was its taking compelled by a special public need or use, which would not in any case support an uncompensated taking. From all appearances, the Port seized an opportunity to confiscate this property for free by joining with Kirby to make some new Texas law.

Neither was this taking foreseeable. Nothing in the relevant Texas statutes authorizes an uncompensated confiscation of private property. Ordinary rules of construction point to the greater likelihood that the Texas legislature had no intent to authorize uncompensated takings. To the contrary, the legislature expressly assigned a full panoply of eminent domain powers to the Port Authority and identified no special concern that would justify an uncompensated taking exception. *See* Texas Water Code §§ 61.115, 62.107. App. 116-118. The Port Authority earlier conveyed this same property in a partially submerged state to Ms. Niedermeier by warranty deed in 1952. The Texas courts thus needed to fashion a new principle of Texas property law in order to reach the conclusion that THI's rights did not exist at the time the property was purchased. Before the case, there is no decision holding submerged property cannot be privately owned if there is any erosion that contributes to its submerged state. The proposition obviously bans private ownership for the future and will support the uncompensated taking of other property in

the future because erosion (or accretion or both) is a given for riparian or littoral property.

If the property is substantial enough to attract the attention of a state agency and would generate sufficient interest for the state to acquire the property by confiscation, a judicial declaration that the property right never existed is too convenient a theory. It should be far more difficult for a state agency to seek such retroactive judicial nullification of a right by recharacterizing state property law. Property was accorded extraordinary status by the Constitution and the rights conferred by that status on the owner of property ought not be subject to the fairly casual treatment accorded by the Texas courts here. Legal fictions, like the one settled on in this case, are an inappropriate ground on which to oust an important constitutional right. This Court has employed a more rigorous analysis rejecting a Florida Supreme Court's "no property" right "holding as a mere 'ipse dixit' that attempted to transform private into public property by simple recharacterization." Thompson, 76 VA. L. REV. at 1538, *quoting Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 164 (1980). The Ninth Circuit had rejected the "no property" theory as well in *Robinson*, 753 F.2d at 1474. Justice Stewart's concurrence in *Hughes* is to the same effect.

There remains sufficient judicial uncertainty over the use of "no property" theories to justify an otherwise unconstitutional taking without compensation to merit this Court's attention.

C. The Texas courts erred also in failing to evaluate whether the uncompensated taking of Tract 1 satisfies due process requirements generally. The courts are obligated by the Due Process Clause to ensure an adequate level of due process fairness in their adjudications. *Keystone Bituminous Coal Ass'n v. DeBenedictis*, 480 U.S. 470, 495 (1987). This case presents several significant due process concerns that were ignored below in the court's evaluation of THI's takings claim. In particular, the response of the courts to the position of the Port Authority resulted in a retroactive recharacterization of THI's property rights in Tract 1. The Port's retroactive nullification of previously recognized property rights is inherently suspect and merits a more searching due process inquiry. *See, e.g.*, *Eastern Enters. v. Apfel*, 524 U.S. 498 (1998). The property was submerged when purchased and had been used for years with the full knowledge and apparent acquiescence of the Port, for the same purpose intended by THI. Indeed, the Port conveyed part of the property to a prior owner by warranty deed. The Port's new position in the litigation was neither expected nor foreseeable. The Port had, in fact, used its eminent domain powers to take all of the rest of the adjacent property, and paid for it. If anything, this case presented a fortuitous opportunity for confiscating valuable property without having to pay for it. One commentator notes, courts are "bound to apply due process standards of

reasonableness and fairness in exercising their interpretative functions." Walston, *supra*, at 435.[10]

The lack of fairness in the proceedings below are manifest and compelling. Even if THI had every opportunity to be heard and thus enjoyed the benefit of all normal procedural rights, either the courts were not listening or felt no duty to evaluate the constitutional question presented in consideration of the circumstances. Certainly where property is being confiscated by a court at the request of the state government and the government alleges no corresponding constitutional duty to pay compensation, the courts should be obliged to consider whether all parameters of the Due Process Clause are being addressed and satisfied. *Id.* at 435-37.

This Court has not directly addressed this corollary to traditional takings theory in the case of a judicially proclaimed "no rights" holding and is presented with an appropriate vehicle for doing so in this case.

D. This petition is not so much about submerged property[11] as it is about the power of the

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[10] Mr. Walston believes that the courts cannot unconstitutionality "take" property because they do not enjoy police powers. *Id.*

[11] Submerged property is abundant in the United States but usually has no value to either the state or an owner. It is not worth the trouble to take it. No state agency needs to take the property to treat it as a navigational hazard or address some other legitimate public concern.

courts to redefine or recharacterize property to deprive it of the capability of private ownership and in so doing confiscate it on behalf of the state without requiring the payment of just compensation.

Over more than 100 years, the decisions of this Court and the lower courts provide no clear jurisprudential guideposts for cases like this one. The protection of property rights and accountability for governmental confiscation of property are accorded a special place in our democracy. The constitutional rights that are guaranteed in this setting received shabby treatment from the courts below in this case. The law is and has been unsettled where judicial and state authorities have teamed up as they have here to accomplish an obvious deprivation of important rights.

This court should take the opportunity to enlighten the confused constitutional landscape that has deprived THI of the property and attendant rights that it bought in purchasing twenty-seven acres of commercially valuable land at the eastern tip of Carter-Kirby Island.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX

Corrected Opinion of the Fourteenth Court of Appeals dated February 1, 2007 ..... App. 1

Final Judgment of the District Court of Harris County, Texas, 269th Judicial District dated February 2, 2005 ..... App. 81

Findings of Fact and Conclusions of Law of the District Court of Harris County, Texas, 269th Judicial District dated April 22, 2004 ..... App. 88

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U.S. Const., amend. V ..... App. 107

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Texas Water Code
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Section 61.161 Eminent Domain ..... App. 117

Section 62.106 Condemnation Proceedings ..... App. 117

Section 62.107 Acquisition of Land ..... App. 118

In The
Fourteenth Court of Appeals

No. 14-05-00204-CV

TH INVESTMENTS, INC., Appellant

v.

KIRBY INLAND MARINE, L.P. AND PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS, Appellees

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On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 03-12846

CORRECTED OPINION

We originally issued our opinion affirming the trial court's judgment on January 9, 2007. On Kirby Inland Marine, L.P.,'s unopposed motion to correct the opinion, we withdraw our previous opinion and substitute this corrected opinion in its place.[1]

This appeal by a private landowner, TH Investments ("THI") against the Port of Houston Authority and Kirby Inland Marine, asks us to decide who owns

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[1] We correct the opinion to clarify our description of the trial court's disposition of Kirby's motion for summary judgment in footnote 35.

two tracts of property on the Old River and the San Jacinto River. As will be discussed in greater detail below, both rivers are subject to the tides. Three broad issues – and many sub-issues – are presented.

The first two issues pertain to the first tract, Tract 1. We first must determine whether the State has gained ownership of it because the property is covered by shallow tidal waters. Second, we are asked to decide if the location the trial court chose for the southern boundary of Tract 1 coincides with the boundary set by the original 1838 survey of the property. The third issue involves Tract 2. We are asked to decide whether THI owns Tract 2. In the body of the opinion we will address the many sub-issues, but for purposes of this overview, we hold the following regarding the three broad issues. First, the State did gain ownership of Tract 1 because it became submerged as a result of indistinguishable effects of erosion and subsidence. Therefore, the trial court correctly ruled that the Port owns Tract 1. Second, the southern boundary set by the trial court for Tract 1 is the same as boundary set by the original 1838 survey. Third, as the trial court held, THI does not own Tract 2. In short, we affirm the trial court's rulings.

Factual and Procedural Background

The property lies near the confluence of the Old River and the San Jacinto River, east of Houston near Channelview, in Harris County, Texas. Tract 1, which

historically consisted of 27 acres, is now a "flat," almost completely submerged beneath the waters of the two rivers.[2] Occasionally, Tract 1 becomes exposed during the fall and winter months during low tide when a north wind blows. Tract 2 is a small parcel of land to the east consisting of 6.1 acres variously described as an island or a strip of riverbank. The two tracts are sometimes identified by their acreage as "the 27 Acre Tract" and "the 6.1 Acre Tract." The area around the property is subject to significant commercial maritime use, as well as occasional use for recreational purposes by pleasure craft and for fishing.

What follows are the relevant facts framing the dispute; more specific details are developed in the discussion of the issues.

THI's Purchase of the Property

In November 2002, THI acquired record title to Tract 1 by a non-warranty deed from the record owners, known collectively as the "Carter Heirs," and acquired Tract 2 by quitclam deed from the Carter Heirs. The contract of sale for Tract 1 included an

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[2] The trial court's Finding of Fact No. 3, which is unchallenged, specifically states that Tract 1 "lies in Harris County, east of the City of Houston, north of the confluence of the Houston Ship Channel and the San Jacinto River, south of Interstate 10, and in the area of confluence of the San Jacinto River (to the east and south of the property) and Old River (to the north and west of the property)."

"Addendum for Coastal Area Property," which provided to THI the following notice:

NOTICE REGARDING
COASTAL AREA PROPERTY

1. **The real property described in and subject to this contract adjoins and shares a common boundary with the tidally influenced submerged lands of the state.** The boundary is subject to change and can be determined accurately only by a survey on the ground made by a licensed state land surveyor in accordance with the original grant from the sovereign. **The owner of the property described in this contract may gain or lose portions of the tract because of changes in the boundary.**

* * *

3. **State law prohibits the use, encumbrance, construction, or placing of any structure in, on, or over state-owned submerged lands below the applicable tide line,** without proper permission.

4. **The purchaser or grantee is hereby advised to seek the advice of an attorney or other qualified person as to the legal nature and effect of the facts set forth in this notice** on the property described in and subject to this contract. Information regarding the location of the applicable tide line as to the property described in and subject to this contract may be obtained from

> the surveying division of the General Land Office in Austin.

(emphasis added). When he signed the contract for sale, THI's president, Earl Thrift, neither read the deeds himself nor engaged counsel to do so.

When THI purchased the land from the Carter Heirs in 2002, the Carter Heirs also assigned to THI a lease with Kirby Inland Marine, L.P. THI, which intended to start its own barge fleeting business, then informed Kirby that it would either have to vacate the area and remove any improvements made or start paying $35,000 monthly in rent.[3] When Kirby did not agree to THI's demands, THI terminated the lease and threatened to evict Kirby.

The Lawsuit

As a result of THI's actions, Kirby filed suit against THI to enjoin it from interfering with Kirby's business operations and to obtain a declaratory judgment that the State of Texas – not THI – owned Tract 1.[4] Kirby later joined the Port, asserting that

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[3] Since 1978, Kirby, or its predecessor, Western Towing Co., had leased Tract 1 from the Carter Heirs to conduct its barge mooring and fleeting business adjacent to the property. From 1978 until 1991, the Carter Heirs charged $500 a month for the lease, and in 1991 increased it to $1,000 a month.

[4] The trial court granted a temporary restraining order prohibiting THI from interfering with Kirby's use and possession, and the parties later agreed to a temporary injunction pending trial.

the State conveyed ownership of the property to the Port by statute.[5] Eventually, the posture of the case evolved into, primarily, an action by THI on its counterclaims and cross-claims for trespass to try title to Tract 1 and Tract 2. THI claimed record title to both tracts, and Kirby claimed ownership of Tract 2. The Port claimed that it owned any part of Tract 1 or 2 that was below mean high tide or was raised above mean high tide by artificial means or "self-help."

The trial court tried the issues in two phases. Phase 1 was a bench trial with THI as plaintiff on its trespass to try title action involving Tract 1; the parties presented evidence on the ownership and boundaries of the tract. The trial court heard two weeks of evidence from numerous witnesses and received many exhibits into evidence. At the conclusion of the trial, the court entered detailed findings of fact and conclusions of law. It found that THI never owned Tract 1 and that ownership of Tract 1 passed to the Port, as successor to the State of Texas, because the tract became submerged below the line of mean high tide. The court also set the southern boundary for Tract 1.

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[5] Kirby joined both the Port and the General Land Office of the State of Texas ("GLO"). However, the trial court later granted the GLO's plea to the jurisdiction and motion to dismiss, in which it argued in part that the State had no interest in the property at issue because the property was conveyed to the Port by statute.

Following the bench trial, Phase 2 proceeded on Tract 2. The court considered the parties' cross-motions for summary judgment as to ownership of the tract. The court granted the Port's and Kirby's motions for summary judgment on THI's claim of record title to Tract 2, denying THI's claim of ownership. The trial court did not determine who owned Tract 2; it held only that THI did not own it.

At the conclusion of phase 2, the trial court signed a final judgment incorporating its earlier orders and attaching as an exhibit its findings of fact and conclusions of law entered after Phase 1. This appeal followed.

I. Part 1: Ownership of Tract 1

We turn now to the first general area of contention, the ownership of Tract 1. In Part 1 of its brief, THI claims that it, not the Port, owns Tract 1 because this case falls within an exception to the general rule that the State owns all property covered by tide waters. This claim is based on two concepts it argues apply here and on several allegedly erroneous findings of fact the trial court entered. The two concepts are that (1) private owners can own property under tide waters, and (2) if the property is submerged under tide waters because of subsidence, the general rule that the state owns submerged lands does not apply.

THI interweaves these two concepts throughout six issues:

(1) the trial court erred by holding that THI lost its riparian land to the Port as the land subsided and most of it became shallowly submerged beneath the waters of the Old River;

(2) the trial court erred by not following *Coastal Industrial Water Authority v. York,* 532 S.W.[2d] 949 (Tex. 1979);

(3) the trial court's ruling constitutes a taking in violation of the Texas and United States Constitutions;

(4) no evidence or insufficient evidence supports the trial court's finding reciting that the extent to which subsidence versus erosion contributed to the submergence of Tract 1 cannot be determined, or alternatively, the trial court misplaced the burden of proof and applied incorrect legal standards;

(5) no evidence or insufficient evidence supports the trial court's findings that a boundary of Tract 1 described as "the meanders of Old River" cannot now be identified or located, and that the tract cannot be distinguished from the bed of Old River, or alternatively, the trial court applied the wrong standard; and

(6) no evidence or insufficient evidence supports the trial court's findings that the entirety of Tract 1 became submerged at some time in the past and that the portions of the tract

> that now lie above mean high water reemerged as the result of the deposit of dredge spoils by Kirby and its predecessor, Western Towing.

Before we address THI's specific issues and the two concepts underlying them, we will review generally the law that applies to riparian and littoral owners.[6]

A. Tract 1 is Under Tidal Waters which Typically are Owned by the State.

1. The State Presumptively Owns Lands Lying under Tidal Waters.

Generally, "[t]he soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people." *Lorino v. Crawford Packing*, 142 Tex. 51, 175 S.W.2d 410, 413 (1943). Section 11.012(c) of the Texas Natural Resources Code echoes the *Lorino* holding: "The State of Texas owns the water and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries provided in this section, including all land which is

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[6] The term "riparian" means "belonging or relating to the bank of a river or stream." *Brainard v. State*, 12 S.W.3d 6, 15 n. 2 (Tex. 1999). A "riparian owner" is one whose land is bounded by a river. *Id.* The term "littoral" means "belonging to the shore," and a "littoral owner" is one whose land borders an ocean, sea, or lake. *Id.* at 21 n. 7.

covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide." TEX. NAT. RES.CODE § 11.012(c). "[N]avigable waters and streams[7] are reserved to the State for the use of the public generally, and no one should have an exclusive right to the enjoyment of such property, unless and until the Legislature has granted such right." *Lorino,* 175 S.W.2d at 414. Thus, two presumptions arise regarding submerged lands: (1) they are owned by the State and (2) the State has not acted to divest itself of title to them. *See, e.g., Lorino,* 175 S.W.2d at 414; *City of Galveston v. Mann,* 135 Tex. 319, 143 S.W.2d 1028, 1033 (1940); *State v. Bradford,* 121 Tex. 515, 50 S.W.2d 1065, 1069 (1932); *Landry v. Robison,* 110 Tex. 295, 219 S.W. 819, 820 (1920); *City of Galveston v. Menard,* 23 Tex. 349, 392 (1859).

Addressing these presumptions, the *Lorino* court explained that "land under navigable waters is withdrawn from the general provisions of the statutes conferring upon the Land Commissioner the right to contract for the sale or lease thereof." *Lorino,* 175

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[7] "Navigable waters" are defined broadly in Texas and they include waters within the tidewater limits of the Gulf of Mexico and streams that are navigable in law or fact. *See State v. Bradford,* 121 Tex. 515, 50 S.W.2d 1065, 1069 ("navigable waters" includes "navigable streams, as defined by statute, lakes, bays, inlets, and other areas within tidewater limits within its borders"); *Lorino,* 175 S.W.2d at 413 ("The bays inlets, and other waters along the Gulf Coast which are subject to the ebb and flow of the tide of the Gulf of Mexico are defined as 'navigable waters.'").

S.W.2d at 413. Instead, only the Texas Legislature may convey submerged tidal lands. *See id.* at 414. The Court explained the reason for this rule as follows:

> It has always been the policy of the State to dispose of ordinary public lands to settlers, and under usual circumstances it may be presumed that the State has parted with title; but navigable waters and streams are reserved to the State for the use of the public generally, and no one should have an exclusive right to the enjoyment of such property, unless and until the Legislature has granted such right. Therefore, it has been the policy of the State to retain title to lands covered by navigable waters, and the presumption is that there has not been any act of the State divesting itself of title.

Id. at 414 (citing *Bradford,* 50 S.W.2d at 1069).

The public policy that informs the presumption of State ownership is also reflected in the Texas Legislature's 1927 conveyance to the Port's predecessor, a political subdivision of the State. The Legislature conveyed to the Port's predecessor all of the submerged lands "as now or hereafter located" in the areas presently at issue, including those lands submerged beneath the waters of the Old River and the San Jacinto River. *See* Act of April 5, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 438. This conveyance included "all the submerged lands lying and being situated under the waters of . . . San

Jacinto River . . . [and] . . . Old River . . . so far up said streams as the State may own same, together with all lands lying and being situated under the waters of Old River . . . and all other tidal flats or overflow land adjacent to or appurtenant to the above mentioned streams. . . . as now or hereafter located. . . . " *Id.* at 438, § 1.[8] The Legislature directed the Port to administer these lands "for public purposes and the development of commerce only" in connection with the development of the Port of

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[8] The trial court concluded that, as Tract 1 became submerged below the line of mean high tide, ownership of that submerged property passed to the Port pursuant to Texas law and the provisions of the Act of April 5, 1927. THI contends the trial court's interpretation of the 1927 Act was in error, because its ruling that Tract 1 reverted to the State conflicts with the following language of section 4 of the Act:

> The purposes and provisions of the Act, and the grants, rights and privileges, thereunder to [Port], shall not affect, curtail or abridge the rights of riparian owners of lands abutting upon the islands and lands subject to overflow, and lands lying under the streams, bays and lakes herein described or referred to, as the same existed under the Common Law or the Constitution or Statutes of Texas at the time this Act shall become in force and effect, or to deprive riparian owners of access to such streams, channels or waterways.

However, we do not read this section to abridge any of the general rules of riparian or littoral rights applied here. In fact, the Act did not cause THI to lose title; these well-established rules caused THI's loss. The only relevant question is the location of the line of mean high tide. The Act merely fixed the ownership of the property in the Port once the property became submerged below the line of mean high tide.

Houston. *Id.* The Legislature also directed that the Port was not at any time to "give or alien said lands or any part thereof" and empowered the Port to "abate and remove any and all encroachments or structures of any kind now or hereafter existing on such property." *Id.* at 439, §§ 2, 3.

2. Unchallenged Findings of Fact State that the Land is Under Tide Waters.

The trial court entered a fact finding, unchallenged by THI, that the waters of Old River and the San Jacinto River are navigable.[9] Also unchallenged by THI is the trial court's finding that the land is subject to the ebb and flow of the tide, is within the tidewater limits of the Gulf of Mexico, and is tidally influenced:

The water over, around and in the area of the 27-Acre Tract is subject to the ebb and flow of the tide, being within the tidewater limits of the Gulf of Mexico. The waters of Old River and the San Jacinto River likewise are tidally influenced in the area in question. The facts in the record demonstrate the area is tidally influenced. The parties likewise stipulated the area is tidally influenced.

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[9] The trial court also concluded that the waters of Old River and the San Jacinto River are navigable in law, because the waters are tidally influenced and the rivers average more than 30 feet in width from their mouths up, citing *Lorino,* 175 S.W.2d at 413, *Bradford,* 50 S.W.2d at 1069, and Texas Natural Resources Code section 21.001(3).

3. The Boundary between Public Submerged Tidal Lands and Private Lands Derived from a Common-Law Grant is Mean High Tide.

The Texas Supreme Court long ago announced the boundary between State and private ownership of submerged tidal lands. For common law land grants, the boundary is the line of mean high tide; for Spanish or Mexican grants, it is the line of mean higher high tide. *See Luttes v. State,* 159 Tex. 500, 324 S.W.2d 167, 175 (1958) (civil law); *Rudder v. Ponder,* 156 Tex. 185, 293 S.W.2d 736, 741 (1956) (common law); *see also Kenedy Mem'l Found. v. Dewhurst,* 90 S.W.3d 268, 270 (Tex. 2002) (applying rule of *Luttes* to locate shoreline boundary). Because the property at issue passed under a common law grant, the boundary line that applies here, in the absence of any exception, is the line of mean high tide.[10]

This boundary is not static. The boundary moves because the line of the tide moves over time, and as that line moves, so does the boundary between State-owned submerged lands and privately owned uplands. *See Brainard v. State,* 12 S.W.3d 6, 17 (Tex. 1999) ("Texas follows the general rule that when the location of the margin or bed of a body of water that constitutes the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the

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[10] Mean high tide is measured by taking an average of all the daily highest readings over a long period. *Luttes,* 324 S.W.2d at 174. Mean high tide is the same as mean high water. *See id.*

body of water, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly."); *Coastal Indus. Water Auth. v. York,* 532 S.W.2d 949, 952 (Tex. 1976) ("The general rule is that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly added or taken to or from his fast bank or shore."); *City of Port Isabel v. Mo. Pac. R. Co.,* 729 S.W.2d 939, 942 (Tex.App. – Corpus Christi 1987, writ ref'd n.r.e.) ("[T]he location of the shoreline, wherever it may be at any given time, represents the boundary of a littoral owner's property."); *City of Corpus Christi v. Davis,* 622 S.W.2d 640, 643 (Tex.App. – Austin 1981, writ ref'd n.r.e.) ("With respect to the landward advance of the line of mean high tide, the Supreme Court has written that if the sea encroaches and the upland owner loses his land, he has no redress.") (citing *State v. Balli,* 144 Tex. 195, 190 S.W.2d 71, 100 (1944)).

The tide is not the only factor changing the boundary. It also can be changed by nature's forces – primarily water – that add to or subtract from a body of land. Additions to land generally are created by accretion or reliction. *Brainard,* 12 S.W.3d at 17. With accretion, land increases gradually and imperceptibly when water deposits solid material so that land once covered by water becomes dry. *Id.* Reliction occurs when previously submerged land is uncovered by permanently receding water. *Id.* Decreases in tidal lands generally are caused by erosion, which gradually and imperceptibly wears away the land. *See York,* 532 S.W.2d at 952. All of these processes may cause a

riparian or littoral owner to gain or lose title to the land.[11]

B. This Case Does Not Fall Under Any Potential Exceptions or Case Law THI Cites.

With these general legal principals [sic] in mind, we turn now to the exceptions and case law THI claims apply. THI claims this case falls within one of several exceptions that would allow it to continue to own land submerged under tide waters. First, THI refers us to at least one case in which the State has conveyed land to an individual. Second, THI relies heavily on *Coastal Industrial Water Authority v. York* and its holding that an individual owned property beneath the San Jacinto River that became submerged because of subsidence. THI also cites us to a handful of appellate court opinions it claims allowed individuals to continue owning land that became submerged.[12]

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[11] A different rule is usually applied in the case of the sudden removal or deposit of land; this rapid or perceptible change is termed "avulsion." *York*, 532 S.W.2d at 952. Generally, title does not pass by avulsion. *Id.* Nor may a landowner acquire title to accreted land by artificially building up submerged land into dry land along his shoreline. *Brainard*, 12 S.W.3d at 19; *York*, 532 S.W.2d at 952.

[12] THI also cited an attorney general opinion, but it was not highly relevant to the resolution of the issues before us. *See* Op. Tex. Att'y Gen. No. GA-0181 (2004).

We consider these claims below. However, as we explain, we disagree that either claimed exception applies here, and, in light of *Luttes, Rudder, Lorino, Brainard,* and *Kenedy Memorial Foundation* – the seminal cases explaining the boundaries between state-owned and privately owned land – we find the cited case law either of questionable validity or distinguishable. *See Luttes v. State,* 159 Tex. 500, 324 S.W.2d 167 (1958); *Rudder v. Ponder,* 156 Tex. 185, 293 S.W.2d 736 (1956); *Lorino v. Crawford Packing,* 142 Tex. 51, 175 S.W.2d 410 (1943); *Brainard v. State,* 12 S.W.3d 6 (Tex. 1999); *Kenedy Mem'l Found. v. Dewhurst,* 90 S.W.3d 268 (Tex. 2002).

1. Private Individuals Can Own Land Conveyed to Them by the State Even When the Land is Under Water.

a. Submerged property conveyed by the State can be owned by a private individual if the conveyance contemplated submerged land.

Property conveyed by the State to an individual can remain privately owned even if it is submerged under tide waters – but only under very special circumstances in which the State manifested its intent that the private landowner continue to own the property even if submerged.

An example of a case in which the Texas Supreme Court found that a private individual owned shallowly submerged flats is *City of Galveston v. Menard,* 23 Tex. 349 (1859), involving Galveston

Island, located in the tidal waters of Galveston Bay. Menard, as the original grantee of the state, claimed that he owned the submerged flats because they were sold to him through a legislative grant by the Republic of Texas in 1836 and through a patent issued in 1838. *Id.* at 391. The City claimed that the 1836 grant did not include the flats, and that they remained in republic and state ownership until a later date, when the Texas Legislature conveyed the flats to the City. *Id.*

The Court recognized the well-established common-law doctrine that an ordinary grant of land upon a bay, where the tide ebbs and flows, "does not convey the shore or any of the land of the bay covered with water." *Id.* at 396. But, based on the object of the grant, its location, and the acts of the contracting parties, the Court determined that the Legislature intended to convey the submerged flats to Menard, specifically to encourage the construction of a port of entry for commercial activities and promote the building of a city on Galveston Island. *Id.* at 398-408. Menard's rights were limited only by the City's right to build and regulate the wharves and to open, improve, and use streets across the property out to the channel. *Id.* at 408.

b. Tract 1 was dry land when conveyed by the State.

This appeal does not involve a conveyance like *Menard*. Although THI attempts to overcome the

presumption of state ownership by showing that the Republic of Texas patented Tract 1 and other property into private ownership in 1845, the only land that THI's predecessors received from the patent was a grant of dry land. THI does not contend that the State granted to its predecessors any submerged lands. Indeed, THI states in its briefing that "[i]t is undisputed that Tract 1 was dry land at the time of the . . . Grant." One may not convey more than one owns, and in this case, it is undisputed that the 1845 patent did not convey any submerged property. Nor do we find any evidence that the grant contemplated ownership by an individual if the property became submerged. Therefore, the patent does not overcome the presumption of state ownership. *See Lorino,* 175 S.W.2d at 414; *Mann,* 143 S.W.2d at 1035; *City of Port Isabel,* 729 S.W.2d at 942-43.

Thus, although private individuals can own submerged property if the State's conveyance contemplated private ownership of submerged lands, the State's patent concerning Tract 1 did not reflect an intent that it remain in private ownership if it became submerged.[13]

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[13] Under this section of its brief, THI also argues another exception to the presumption that the State owns submerged tidal lands by suggesting that when the water is only tidally *influenced* – not tidal – the typical cases involving land subject to tide waters do not apply. Relying on the opinion of one of its experts, THI argues that the environment of Tract 1 is "fluvial," meaning it is dominated by the processes of river water moving downstream, rather than littoral, meaning dominated by wave

(Continued on following page)

2. *York* and Any Exceptions it Creates Do Not Apply.

We now turn to THI's claim that *Coastal Industrial Water Authority v. York,* 532 S.W.2d 949 (Tex. 1979), creates an exception to the general rule of state ownership of submerged lands, that *York* controls the outcome of this appeal, and that the trial court erred when it refused to apply it. We disagree and explain below that *York* is distinguishable from this case in several important respects.

a. Two defining and narrowing facts in York distinguish it from this appeal.

In *York,* the Water Authority sought to condemn York's land near the San Jacinto Monument. 532

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or tide-induced processes, and the area is not a bay, inlet, or arm of the Gulf of Mexico. Although the Port's expert acknowledged that the area is affected by fluvial processes, he described the site as a "coastal environment," in which the waters of Old River and the San Jacinto River are brackish, tidally influenced estuaries of the Gulf. Moreover, we find no exception made in the case law for tidally influenced water and THI. The Texas Supreme Court in *Kenedy Memorial Foundation* makes it clear that only a very little movement of water suffices for tide-water cases to apply. *See* 90 S.W.3d at 280 (applying the line of the tide where "seawater inundation is regular, shallow, and somewhat infrequent"); *see also Crary v. Port Arthur Channel & Dock Co.,* 92 Tex. 275, 47 S.W. 967, 970 (1898) (holding the phrase "waters of the gulf of Mexico" was "comprehensive" and "sufficiently broad to embrace at least all bays, inlets, and streams upon the Gulf Coast to the extent to which they are subject to the ebb and flow of the tide"). Consequently, this argument also does not overcome the general presumption.

S.W.2d at 951. A survey of York's property in 1950 showed 28.083 acres above the water level, but when the Water Authority commenced condemnation in 1970, only 24.73 acres lay above water – a difference of 3.353 acres. *Id.* York's land indisputably was in an area where the land surface had been slowly subsiding during several decades because area industries and municipalities had removed enormous amounts of underground water. *Id.* As the land subsided, the adjacent waters encroached upon and submerged the land. *Id.* York argued, and the lower courts agreed, that the Water Authority should compensate York for the all of the acreage originally conveyed to him, including the 3.353 acres that had become submerged. *Id.*

As the *York* court explained, the general rule is that a riparian or littoral owner loses title to land that is worn away gradually by erosion, and gains title to land added gradually by accretion. *Id.* at 592. However, the Court distinguished subsidence from these processes, stating that subsidence is not "an ordinary hazard of riparian ownership; it is not the result of the force of the waters which takes from some owners and gives to others." *Id.* at 954. Determining that no conflict between private and public interests existed under the facts before it, the Court concluded that it was "consistent with the interests of all to permit the riparian owner to protect his land – rather than to watch helplessly as his boundary retreats." *Id.* Thus, because York's property became submerged below the water level of the Houston Ship

Channel solely as a result of subsidence, the Court held that York owned the submerged land as of the date the Water Authority had sought to take York's property by condemnation. *Id.* Consequently, the Water Authority was required to compensate York for the submerged property. *See id.*

At least two courts – including the Texas Supreme Court itself – have recognized the very limited nature of the *York* holding. *See Brainard,* 12 S.W.3d at 20 ("Nonetheless, we find nothing in *York's* limited holding that precludes the operation of the rules of accretion, reliction, and erosion to artificially influenced changes in a river channel."); *Davis,* 622 S.W.2d at 643 ("Although the [*York*] Court reaffirmed the rules with respect to property loss and gain due to erosion and accretion, those rules were not employed by the Court in its determination that the riparian owner held title to the submerged land since there was no erosion involved, only subsidence."). As we discuss, statements made by the *York* court itself limit the opinion to such a degree that it does not control our decision here, and the trial court appropriately did not apply it.

(1) *York* did not involve land covered by tidal waters.

The first, and most important, limitation of *York* is that it did not involve tide waters. The *York* court expressly stated it assumed that the tide was of no effect: "The testimony of the surveyor witnesses

indicates that the level of the water upon the York land does not fluctuate with the ebb and flow of the tide, and we will *assume* that the tide has no effect at this point." *Id.* at 951 (emphasis added). In footnote 1, the court explained that the effect of the tide on the legal outcome of the case simply was not an issue raised by the parties: "The parties have not, at any point in this litigation, made any reference to the fact or legal effect of the tide. For this reason, the court's opinion is *restricted* to the issues presented by the *peculiar facts* of this record and the contentions of the parties." *Id.* at 951 n. 1 (emphasis added). Author Justice Reavley added: "The writer of this opinion, speaking personally, chooses to emphasize the *narrowness* of the holding and to *warn* against any misinterpretation of its effect upon the boundary of private ownership to lands within reach of the tide." *Id.* (emphasis added).[14] Although the intermediate appellate court's opinion in *York* did state that the property was subject to tide water, the Supreme Court expressly assumed no tide water covered the property. *See id.* at 951.

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[14] THI dismisses this footnote. It asserts it is not a holding of the Texas Supreme Court, but only the author's personal opinion. Although that part of the footnote expressing the author's personal opinion is not a holding of the court, it is some indication of the facts the court considered important.

(2) *York* involved only subsidence and not other forces.

A second important distinction between this appeal and *York*, as we explain below, is that the *York* property was submerged due to subsidence alone. No erosion was involved. In fact, the *York* court recognized that the result could have been different if other forces, such as erosion, had affected the property. The Court noted "[i]t might be expected" that part or all of the contested acreage would have been eroded by the current of the water "so as to leave this three acre area indistinct from the bed of the ship channel." *Id.* at 951-52. Had that happened, the Court acknowledged that "ownership would have been lost to the riparian owner . . . and passed to the City of Houston under the authorities to be discussed." *Id.* at 952. However, as the case was presented to the Court, "there has been no displacement of the submerged land in relation to the bed of the ship channel." *Id.*[15]

In short, the two facts that define *York*, especially for comparison with this case are these: (1) tide

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[15] The court of appeals had applied a rule in favor of York which assumed the boundaries of the 28.083 acres were identified, and the Water Authority did not contest this issue. 532 S.W.2d at 952. Nor did the Water Authority claim any erosion of the subsided shelf. *Id.* The supreme court therefore assumed that the property's boundaries were identifiable and there had been no erosion of the 3.353 acres. *Id.* Thus, *York* did not address a situation involving land affected by subsidence and other processes like erosion.

waters did not cover the *York* property,[16] and (2) *York* involved only subsidence without any erosion.

b. The trial court's findings distinguish this appeal from *York*.

Several of the trial court's findings relate directly to *York* and whether *York* controls this case. According to the Port, if we uphold these findings, *York* does not control this case. We will consider first the court's findings that the boundary of Tract 1 cannot be distinguished from the Old River and that the boundary on one side of the property, which followed "the meanders of the Old River," cannot be identified now.[17] We then will turn to the findings reflecting the court's decision that one cannot determine the extent to which subsidence, as opposed to erosion, contributed to the submergence of Tract 1.

THI claims these findings are both legally and factually insufficient. A trial court's findings are reviewable for legal and factual sufficiency by the

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[16] THI claims tide waters must have covered the *York* property because it was in the same general area as Tract 1 but south of Tract 1, meaning that it was closer to Galveston Bay and the Gulf. Yet, as we have noted, the *York* court stated quite explicitly that it assumed – and expert testimony showed – that tide waters did not affect the property. *Id.* at 951.

[17] This finding is significant because it relates directly to whether the property eroded or subsided. According to at least one of the experts, if Tract 1 had merely subsided, it simply would have dropped and its boundaries would have remained relatively intact.

same standards that are applied in reviewing evidence supporting a jury's answer. *Catalina v. Blasdel,* 881 S.W.2d 295, 297 (Tex. 1994). In determining whether legally sufficient evidence supports the trial court's findings of fact, we consider the evidence in the light most favorable to the challenged finding and indulge every reasonable inference that would support it. *See City of Keller v. Wilson,* 168 S.W.3d 802, 822 (Tex. 2005). We must credit favorable evidence if a reasonable factfinder could and disregard contrary evidence unless a reasonable factfinder could not disregard it. *See id.* at 827. We must determine whether the evidence at trial would enable a reasonable and fair-minded person to find the facts at issue. *See id.* The factfinder is the sole judge of the credibility of the witnesses and the weight to give their testimony. *See id.* at 819. Evidence is conclusive only if reasonable people could not differ in their conclusions. *See id.* at 816.

When a party attacks the legal sufficiency of an adverse finding when it had the burden of proof on the issue,[18] it must demonstrate on appeal that the

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[18] According to THI, by stipulation it owned record title to Tract 1; so, because the Port sought to divest THI's record title, the burden should have been on the Port and Kirby to prove the Port held a superior right to THI's title. THI pursued a trespass to try title claim as a counterclaim. The Texas Supreme Court recently held that a trespass to try title suit is the proper cause for all land title disputes, including boundary disputes. *Martin v. Amerman,* 133 S.W.3d 262, 264-67 (Tex. 2004). THI is correct that one of the ways to prevail in such a suit is "to prove a

(Continued on following page)

evidence establishes, as a matter of law, all vital facts in support of the issue. *Dow Chem. Co. v. Francis,* 46 S.W.3d 237, 241 (Tex. 2001). We first examine the record for evidence that supports the finding, while ignoring all evidence to the contrary. *Id.* If no evidence supports the finding, we then examine the entire record to determine if the contrary proposition is established as a matter of law. *Id.* We may sustain the issue only if the contrary proposition is conclusively established. *Id.*

In reviewing a factual insufficiency point, we consider all the evidence presented at trial. *Plas-Tex, Inc. v. U.S. Steel Corp.,* 772 S.W.2d 442, 445 (Tex. 1989). When a party attacks the factual sufficiency of an adverse finding on an issue on which it has the burden of proof, it must demonstrate on appeal that the adverse finding is against the great weight and preponderance of the evidence. *Dow Chem. Co.,* 46 S.W.3d at 242. We may set aside a verdict only if the evidence is so weak or if the finding is so against the great weight and preponderance of the evidence that it is clearly wrong and unjust. *Id.* Unchallenged fact findings are binding on this Court unless the contrary is established as a matter of law or there is no

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regular chain of conveyances from the sovereign," *see id.* at 265, but a trespass to try title plaintiff must also prove the location and identity of the land. *See Hancock v. Moore,* 137 S.W.2d 45, 50 (Tex.Civ.App. – El Paso 1939), *aff'd,* 135 Tex. 619, 146 S.W.2d 369 (1940). As discussed in greater detail below, THI did not prevail on those requirements.

evidence to support the finding. *McGalliard v. Kuhlmann,* 722 S.W.2d 694, 696 (Tex. 1986).

To resolve these issues, we examine the evidence presented by both side's experts, who testified extensively concerning their opinions.

(1) The boundaries of Tract 1 cannot be located.

We turn now to consider the trial court's finding that the boundaries of Tract 1 could not be located. Before addressing the fact findings THI challenges, we set out those THI does not challenge:

- "A 1916 topographical map (Common Exhibit 29) shows that the land at the location in question was generally in the shape of what the parties and witnesses called a 'Rabbit's Head.' No such shape can now be identified at the location in question. The shape of the tract surveyed by THI's surveyor, Bill Merten, is called 'Tract 1' and differs materially in shape from the historic 'Rabbit's Head.'"
- "At present, there exists at the location what the parties and witnesses have called a 'Flat' This Flat is typically covered by tidal waters but is occasionally uncovered, as shown by many of the photographic exhibits. While there exists a drop off to the north of the Flat, the evidence shows that this was created by dredging. The Flat extends to the south

> beyond the boundaries claimed by THI for the 27-Acre Tract. The topography of the Flat is generally flat, with minor differences in elevation."

THI's expert testified that he could locate the border described as "the meanders of the Old River." The Port's and Kirby's expert testified, on the other hand, that she could not find the border of Tract 1 defined by the meanders of the Old River. The dispute on this issue turned on which expert used the proper method for locating the meanders. We first review the method THI's expert used to determine the northern and western boundaries of Tract 1.

THI's surveyor, William Merten, is a Licensed State Land Surveyor ("LSLS")[19] in Texas who surveyed the property for this litigation. THI hired Merten to survey all of Tract 1, but for purposes of this issue the only portion of Merten's survey in dispute is his survey of the northern and western boundaries of Tract 1 – the "meanders of Old River."

Merten surveyed the area to the north and east of Tract 1 with the goal of locating the bank of the Old River as it was before Kirby's predecessor dredged it

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[19] Merten testified that there were approximately seventy LSLSes in Texas, and that they are qualified to file surveys and field notes delineating boundaries between State and private land with the General Land Office. A Registered Professional Land Surveyor ("RPLS"), in contrast, is not qualified to file such surveys. According to Merten, there are about 2,500 RPLSes in Texas.

out. To find this portion of the bank, Merten visually inspected the site, viewed photographs, and reviewed a Corps of Engineers dredging permit. He described his methodology as an estimate of where he believed the historic meander shoreline should have been. Merten's "thinking was where will the line be if the barges were not there, if the area was not dredged." So, he "came up with an estimate of – where you see here of where I believed the natural line would be if all this man-made activity had not occurred." Thus, Merten drew the line along the north and northeast in the dredged area based on his belief of where he believed the natural, now submerged, meander line should have been. When asked at trial whether a boundary existed on the river bottom today that someone attempting to retrace Merten's steps could find, Merten responded, "On the river bottom, no."

To survey the boundary to the north and west, Merten employed a "probing" technique in which he walked into the water over the submerged land as he probed the bottom to locate the purported submerged bank of Old River. Merten described the "probing" as wading through the water while hanging onto a boat. He felt the bottom with his feet, alternately stepping from hard to soft ground, while taking Global Position System ("GPS") readings at intervals so that he could connect them and draw a line. The hard ground he assumed was the former bank of Old River.

Merten admitted that he had never before used "probing" to locate a submerged boundary line. Merten also acknowledged that there were no authoritative

sources stating that probing was an accepted method, and even offered (perhaps unwittingly) that "[w]e are on uncharted grounds here." None of appellees' witnesses testified that probing was an accepted procedure to identify a submerged boundary line in a title dispute.[20]

The Port's surveyor, Nedra Foster, also an LSLS, testified that, given the existing site, the only way to survey the meanders today was to survey the line of mean high tide. She explained that the line of mean high tide is the proper line to use because the chain of title for Tract 1 is derived from a common-law grant located within a tidally influenced area. Foster's mean high water survey reflected that the only existing meander lines between upland and water are the present meanders of Old River and the San Jacinto River around an island, which is what THI calls Tract 2. Foster testified that if she literally followed an 1896 deed description, the only land above water remaining at the site would be a small

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[20] THI also contends the trial court should have considered the deposition testimony of Sid Bouse, a surveyor initially designated by the Port and then de-designated in favor of Nedra Foster, who testified that he would use a similar method to find submerged boundaries. If the trial court did not consider this testimony with the other evidence THI presented and determined Merten's survey to be unreliable, THI contends this constitutes an abuse of discretion. However, the trial court does not abuse its discretion merely because it determines the correctness of conflicting expert opinions in a way one party does not like. Additionally, the court limited both parties to one expert on this issue, which, in its discretion, it could do.

site less than one tenth of an acre, described as the "Little Thumb." She also identified two other "very small portions" of emergent land outside of the original 27-Acre Tract. Merten's own mean high tide survey substantially agreed with Foster's survey.

THI contends that Merten's survey of these boundaries provides undisputed evidence that a licensed surveyor could and did identify and locate the current "submerged boundaries" of Tract 1 along the meanders of Old River, while the Port's surveyor, Nedra Foster, did not even try to survey these boundaries.[21] THI maintains that, if it is legally permissible for a surveyor to survey the boundaries of private land that is shallowly submerged due to subsidence, then its surveys stand as undisputed evidence of the boundary. Thus, while THI complains about the trial court's fact findings, it frames the issue as one of law.

We agree with THI to the extent that the issue is one of law. The Texas Supreme Court, in discussing the determination of a waterfront boundary in *Kenedy Memorial Foundation,* stated, "But here, as

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[21] THI also points to a survey prepared by F.G. Huffman, an RPLS, who also surveyed the northern and western boundaries for THI in 2002. Merten testified that Huffman used a probing technique from a boat to locate the purported submerged boundaries. The parties dispute whether Huffman's survey was consistent with Merten's. THI ultimately chose Merten over Huffman as their designated surveyor, and did not call Huffman at trial.

in *Luttes,* the exercise is made no easier by basing the boundary determination on a surveyor's subjective observations of the terrain. For certainty in land titles, it is important to have a rule, and the civil law as interpreted in *Luttes* provides one." 90 S.W.3d at 284. Thus, the determining question here is not whether a surveyor *could or did* mark lines for the northern and western "meander" boundaries of the tract, but whether the surveyor properly surveyed lands bounded and covered by tidally-influenced waters. As our discussion of the relevant law makes clear, the only valid way to survey such land is to survey the line of mean high tide. *See Luttes,* 324 S.W.2d at 175; *Rudder,* 293 S.W.2d at 741. THI argues that its land became submerged as a result of subsidence and therefore, based on the Texas Supreme Court's holding in *York,* it is legally permissible to survey the submerged property. But, as we discuss in greater detail below, we reject THI's argument that subsidence alone is responsible for the submergence of Tract 1, and therefore we reject its attempted survey of the submerged property as legally insufficient.

Moreover, in a trespass to try title case, the general test for determining the sufficiency of a description of land is whether the tract can be identified with reasonable certainty. *Zobel v. Slim,* 576 S.W.2d 362, 369 (Tex. 1978). The 1896 Magee/Hudson deed provides a metes and bounds description that includes calls to the meanders of Old River. "[M]eander lines of surveys of land adjacent to or

bounding upon a stream are not to be considered as boundaries, but they are to follow the general course of the stream, which itself constitutes the real boundary." *Stover v. Gilbert,* 112 Tex. 429, 247 S.W. 841, 843 (1923). Thus, there can be no "meanders" or distinct boundaries created by the course of Old River in this case when the waters of Old River cover the site. The evidence demonstrated that Merten's hypothesized survey outline – based on purportedly submerged banks and his belief as to where the natural boundary would have been but for dredging – is not reliable. We therefore agree with the trial court's finding that the northern and western boundaries of Tract cannot be identified or located today. We also find the evidence is legally and factually sufficient to support the trial court's finding that Tract 1 cannot be distinguished from the surrounding area and the bed of Old River.

(2) The effect of subsidence cannot be assessed.

THI also complains that the trial court erred when it held that no one could assess the extent to which subsidence and/or erosion caused Tract 1 to become submerged. The trial court's finding is set out below:

> The physical evolution of the 27 Acre Tract over time was caused by various natural and man-made forces, including subsidence, erosion, deposition, accretion, flooding, tidal inundation, sea level rise, dredging, dredge

> spoil dumping, boat wakes, storm surges, and the location of sunken barges and barge fleeting in The Big Empty.[22] The effects of all of these varied forces on the site cannot be separated, and the extent to which subsidence versus erosion contributed to the submergence cannot be determined.

THI attacks this finding, claiming that the evidence conclusively shows that subsidence caused the submergence. Alternatively, THI contends the trial court misplaced the burden of proof and applied incorrect legal standards, and the evidence is insufficient to support the finding. To resolve the issue, we examine the evidence presented by both sides' experts, who testified extensively concerning their opinions.

(i) The experts did not agree.

THI relied primarily on its experts Robert Gabrysch and Dr. William Dupre. Gabrysch is a hydraulic engineer and groundwater hydrologist with an extensive background in land surface subsidence in the Houston/Galveston area. Dr. Dupre is an associate professor at the Department of Geosciences at the University of Houston, where he has been a member of the faculty for twenty-eight years. His

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[22] "The Big Empty" was the name of the area where Kirby operated its barge fleeting business, located to the north and east of and adjacent to Tract 1.

stated areas of expertise are in sedimentology, geomorphology, and photo interpretation.

Gabrysch testified that his studies and physical inspection of Tract 1 led him to believe the amount of subsidence was probably between eight and nine feet. Dr. Dupre concurred and ultimately concluded that but for man-made subsidence resulting in groundwater withdrawal from the subsurface, Tract 1 would not be submerged today. Dr. Dupre supported his conclusion with (1) photographs of the area taken over the past 75 years showing the shape of the tract consistently shrinking and gradually sinking beneath the water, (2) historical photographs and inspection of the land showing the preservation of natural channels or splays over time, and (3) the presence of buried tree trunks on the tract, which he opined would have been undercut and washed down river had the land been eroded away.

Dr. Douglas Sherman testified on behalf of the Port and Kirby. At the time of trial, Dr. Sherman was a tenured professor and head of the Department of Geography at Texas A & M University, specializing in geomorphology and sedimentology. Dr. Sherman refused to adopt Gabrysch's opinion of the amount of subsidence that had occurred in the area of Tract 1, and he also disagreed that subsidence alone could account for the changes in the shape of the site over time. In support of his opinion, he pointed out that the historic shape of the property, which the parties referred to as a "rabbit's head," could no longer be identified. He explained that "[i]f subsidence were the

only force of change at this site, we would still see that rabbit's head preserved. It would just be deeper." Dr. Sherman also disagreed with Dr. Dupre's opinion that subsidence alone caused the tract's submergence. Further, Dr. Sherman testified that both subsidence and erosion were acting on the property, and he concluded that even if he were to exclude the effects of subsidence from his analysis of the submergence of the tract, most, if not all, of the property would still be submerged. According to Dr. Sherman, the area was transformed from a rabbit's head to a submerged and featureless flat by a number of forces, including erosion, deposition, and human activities such as dredging, as well as subsidence. Viewing all the circumstances, Dr. Sherman testified that he could not quantify the degree to which the various causes impacted the site.

The parties' experts also disagreed concerning the reasons why the tract was not submerged to a depth consistent with the amount of subsidence in the region. In 1916, most of the original 27 Acre Tract was less than two feet in elevation above mean sea level. THI's experts contended the tract had subsided approximately eight feet, so presumably the tract should have dropped to approximately six feet below sea level. However, evidence showed depths of one to one and one-half feet below sea level, the deepest measurement being 1.7 feet. Dr. Dupre testified that, next to subsidence, the most influential process at work on the tract was the deposit of sediment onto the land as water moved across it. He opined that

more sediment was deposited than was lost to erosion, resulting in a net accretion (deposit of sediment) on Tract 1 of one and one-half feet to five feet in the area.

However, Dr. Sherman, the Port's and Kirby's expert, testified that four or more feet of accretion would be needed to make up the difference, and, while he agreed that there was "net deposition" at the site, he disputed the amount of deposition proposed by THI.[23]

(ii) Testimony supports a finding that one cannot assess the degree to which subsidence or erosion caused submergence.

Based on our review of the record, we find the evidence is legally and factually sufficient to support the court's finding that one could not ascertain the

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[23] Dr. Sherman testified in part:

I don't know where the sediment would come from. We've seen the reports that 80-plus percent of the sediment supplied by this river is blocked out by the Lake Houston Dam. We have to add on to that but Lake Houston Dam takes out probably a hundred percent of the sand supply. I mean, we would of had to have an incredible scavenging of the flood plain to get all this material. Even if we accepted that, there's no reason for it to make a pile here and nowhere else on this part of the basin.

extent of erosion versus subsidence.[24] THI would have us hold that the finding is insufficiently supported by evidence because no witness testified that Tract 1 had not subsided, and no witness testified, based on any scientific analysis, that Tract 1 had subsided less than approximately eight feet. Further, THI points out that even Dr. Sherman acknowledged that subsidence had occurred at the THI property, although he could not say how much. The Port's surveyor, Foster, also acknowledged that the area has been affected by subsidence. However, though it may be undisputed that subsidence has occurred, that fact does not render the court's finding insufficient. The finding acknowledges Tract 1 has subsided, but finds that the extent to which subsidence versus erosion contributed to the submergence cannot be determined.[25] Even THI's experts acknowledged that subsidence was not the only factor at work. Dr. Dupre stated that "by looking at the historical maps and aerial photos, its clear that you can document evidence of subsidence, of naturally occurring sediment deposition, naturally occurring bank erosion and the presence of human –

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[24] THI also claims that the trial court imposed an "irrebuttable presumption" of state ownership of submerged lands that could not be overcome. We disagree that the trial court imposed an "irrebuttable presumption" against it. The trial court simply held against THI on crucial fact findings.

[25] In effect, THI would have us hold that any amount of subsidence precludes the application of the general law applied to land under tide waters. This we refuse to do.

in-place dredged materials. So all of these processes to – to one extent or another have been dominant."

Thus, the trial court's finding of fact is supported by legally and factually sufficient evidence. We overrule this issue.

3. Other Appellate Case Law Allowing Private Ownership of Land Under Tide Waters and Rivers Either is of Dubious Value or Distinguishable.

We now turn to THI's third claimed exception to the general rule, that the state owns all land under tidewaters: appellate case law other than *York*. From our perspective, THI uses these cases to try to chip away at *Luttes, Rudder,* and *Lorino,* but, as we explain below, these cases are distinguishable and three of the four were handed down before the *Luttes, Rudder,* and *Lorino* trilogy.

THI primarily relies on four cases other than *York-Diversion Lake Club v. Heath,* 126 Tex. 129, 86 S.W.2d 441 (1935), *Fitzgerald v. Boyles,* 66 S.W.2d 347 (Tex.Civ.App. – Galveston 1931, writ dism'd), *Fisher v. Barber,* 21 S.W.2d 569 (Tex.Civ.App. – Beaumont 1929, no writ), and *Port Acres Sportsman's Club v. Mann,* 541 S.W.2d 847 (Tex.Civ.App. – Beaumont 1976, writ ref'd n.r.e.) – to argue that "submergence does not necessarily destroy the title of the owner."

York, 532 S.W.2d at 954.[26] *Heath* involved land submerged by an artificial lake created after a dam was constructed. *Heath,* 86 S.W.2d at 442. *Fitzgerald* and *Fisher* involved land that either became submerged by tidal waters or became dry as a result of the creation of a channel. *Fitzgerald,* 66 S.W.2d at 348; *Fisher,* 21 S.W.2d at 569-70. In each of these cases, the character of the property was not changed as a result of the ordinary force of the water; there was no "transportation of the land beyond the owner's boundary to effect that result." *See York,* 532 S.W.2d at 954 (citing 5A Thompson on Real Property § 2562 (Grimes ed. 1957)). In *Mann,* the trial court analogized the submergence of marsh land by the continued use of air boats through the marsh over a long period of time to the construction of the dam in *Heath,* and reasoned that the landowner did not lose title to submerged land although the landowner could not exclude others from fishing in the waters above the property. *Mann,* 541 S.W.2d at 849-50.

We do not find these cases controlling here. First, they are distinguishable. None of the cases involved erosion or other forces that we have in this case. Second, to the extent they arguably cast any doubt on the bright line rules announced in *Luttes, Rudder,* and *Lorino,* we think it significant that three of the cases were written before *Luttes, Rudder,* and *Lorino,*

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[26] *York* cites the three older cases in support of its statement that submergence does not necessarily destroy the title of the owner. *See York,* 532 S.W.2d at 953-54.

and the fourth, without mentioning *Luttes, Rudder,* and *Lorino,* relies on one of the earlier three to reach its result. To our reading, the trilogy of *Luttes, Rudder,* and *Lorino* recognized and explained the bright line rules that have long dictated land ownership. And, the trilogy of *York, Kenedy Memorial Foundation,* and *Brainard* reaffirmed the bright line rules. As the Court recently confirmed in *Kenedy Memorial Foundation, Luttes* is still the law:

> The Court's interpretation of the civil law in *Luttes* is reasonable and workable, and it has provided a rule for determining boundaries for more than forty years. While we recognize that the subject is not beyond reconsideration, *stare decisis* is never stronger than in protecting land titles, as to which there is great virtue in certainty. We would be very reluctant to discard a rule determining seashore boundaries that has served as long and satisfactorily as the rule in *Luttes,* thereby upsetting long-settled expectations, and we could not do so absent far more compelling evidence than can be offered here.

Kenedy Mem'l Found., 90 S.W.3d at 281 (citation omitted).

As was the case in *Kenedy Memorial Foundation,* "nothing in the record and argument now before us convinces us that we should reconsider the rule determined in *Luttes.*" *See id.* For these reasons, we choose not to follow whatever rule or exception is created by the four cases THI cites. Instead, we

choose to follow the six Supreme Court cases that announce and reaffirm the *Luttes/Rudder* bright line rule.

4. The Trial Court's Judgment Does Not Violate the Takings Clause

Next, THI contends the trial court's ruling constitutes a taking in violation of the Texas and United States Constitutions. *See* U.S. CONST. amend. V; TEX. CONST. art. I, § 17. Although we depend on the fact-finder to resolve disputed facts regarding the extent of governmental intrusion, the ultimate issue of whether the facts constitute a taking is a question of law. *See City of Austin v. Travis County Landfill Co.*, 73 S.W.3d 234, 240-41 (Tex. 2002).

THI relies on *York* and *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), to argue that submergence by subsidence is not an inherent hazard of owning Tract 1 and there is no exception to the takings clauses that would permit the State to take THI's land without just compensation. However, as we have held, Tract 1 was not affected by subsidence alone, and this and the other factors discussed remove it from the rule applied in *York*. THI acknowledges that the possibilities of loss of land from processes such as erosion are limitations on the ownership rights of the State and private landowners along riparian or littoral boundaries. *See Brainard*, 12 S.W.3d at 18 ("A riparian owner thus . . . loses title to portions of the land that are worn, washed away, or encroached upon by the water."); *York*, 532 S.W.2d at

952 ("The general rule is that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly added or taken to or from his fast bank or shore."). The trial court likewise recognized and applied these limitations, and its order does not effect an unlawful confiscation of THI's property. Nothing in *Lucas* is inconsistent with this result. THI cites no Texas case involving riparian or littoral property in which it was held that property lost as a result of natural occurrences or even natural occurrences in conjunction with manmade causes violates the takings clause, and we are not aware of any.

C. Any Pieces of Disputed Property Above the High Tide Line Also Are Owned by the Port.

1. THI's Complaints.

THI's next issue pertains to several findings of fact and one conclusion of law. The trial court found that the entirety of Tract 1 became submerged at some time in the past and that the portions of the tract that now lie above mean high water re-emerged as the result of the deposit of dredge spoils by Kirby and its predecessor, Western Towing, and concluded that the small portions of Tract 1 currently lying above the water line resulted from "self-help" by THI or its predecessors, so that THI does not own these small portions of land.

The contested findings of fact are as follows:

- "Over a period of decades, the 27-Acre Tract became submerged below the line of mean high tide. This submergence

occurred gradually and imperceptibly and caused the historic meander boundary of the 27-Acre Tract to slowly contract and eventually to disappear."

- "The only existing meander lines between land and water that now exist at the location are the present meanders of Old River and the San Jacinto River around an Island, part of which is claimed by THI to lie within the 27 Acre Tract, and most of which is claimed by THI to lie within the northerly part of the Island, called 'Tract 2' by THI."
- "Small portions of land above the line of mean high tide within the area claimed by THI as the 27 Acre Tract arose from submerged soil beneath the waters of Old River due to the deposit of dredged spoil, sunken barges, and accretion caused by the sunken barges and barge fleeting in and around The Big Empty. These small portions of land would not exist but for such activities, which were conducted by the lessees of the Carter heirs, namely Western Towing and Kirby."

2. Some Evidence Shows that Tract 1 was Permanently Submerged in the Past.

THI's surveyor, Merten, identified three areas within his survey of Tract 1 that lie above mean high water. THI first contends there is no evidence that

the portions of Tract 1 above mean high water ever were permanently submerged below mean high tide in the past. THI points to the testimony of its expert, Dr. Dupre, who testified that he saw no evidence that Tract 1 ever became completely submerged except perhaps during major storm events, and every aerial photograph he reviewed showed emergent land. In contrast, Dr. Sherman, the Port's expert, testified that the submerged areas of the site had been submerged "at least since 1973," and that at some point, the entire area became submerged. Dr. Sherman explained that he reviewed a number of sources to support his opinion, including aerial photography of the property, maps produced by the Bureau of Economic Geology showing the site completely inundated by storm surges from hurricanes Beulah and Carla, and another map from the Bureau depicting submerged lands of the Texas coast that showed, based on 1979 aerial photography, no island visible at all.

THI argues that Dr. Sherman's opinions are suspect because he admitted he did not know what the level of mean high tide was in photographs he reviewed, and he relied on a map which THI contends was based on a photograph taken when the water level was elevated. However, these arguments ignore the totality of Dr. Sherman's testimony concerning the bases for his opinions. Concerning the map, Dr. Sherman explained that the high tide readings THI complains of were only recorded from a remote, single tide gauge in Trinity Bay, and there were no tide gauge readings directly applicable to Tract 1 when

the photograph was taken. He also testified at length about the reasons why he interpreted the map to show that Tract 1 was completely submerged, including the absence of vegetation at the site, and he interpreted the map's data to mean that the entire area was submerged.

3. Some Evidence Proves that Portions of Tract 1 were Above Mean High Tide Because of Self-Help.

THI next challenges the evidence supporting the trial court's findings that the small portions of land above mean high tide were the product of dredging and other self-help activities of the Carter Heirs' lessees, Western and Kirby. Much of the testimony THI relies on is from witnesses who did not see dredging occur, did not engage in dredging, or had no knowledge of dredging. For example, a witness for the Port did not know of any dredging in the area, and a representative of the Carter Heirs testified they did not dredge or deposit spoils on or near the tract. Earl Thrift, Jr., who lived just north of Tract 1 from 1979 through 1983 and piloted tugboats in the area since 1983, testified he never observed dredging along the tract.

THI acknowledges that Patrick Smith, a Western Towing employee from 1989 through 1995, testified that Western Towing did some dredging on the Carter Heirs' property, but emphasizes that he testified that the dredge spoil was to be dumped either in hopper

barges or on dry land – not in the waters of Old River. And, after Smith left Western, he testified that he spent the next seven years, until 2002, managing a business next door to Tract 1, and saw no dredging adjacent to Tract 1 by Kirby or anyone else. However, Smith admitted that he did not know what dredging activities may have occurred in the area before 1989. He also acknowledged that he did not actually watch the dredging operations on a daily basis and agreed that it was possible that dredge spoil could have been dumped elsewhere. He also acknowledged that the bottoms of the barges were largely rusted out, and dredge spoil could have leaked from them.

In addition to the evidence that Western Towing conducted dredging operations at the site, Dr. Sherman testified that the re-emergence of "land" at the site, which was completely submerged, was caused by the placement of barges and the dumping of dredge spoil. Dr. Sherman also testified that the barges anchored at the site in the 1980s changed the flow pattern of the water around them, causing the deposit of sediment in shoals forming behind them and preventing even greater erosion from occurring. Sherman testified that "if the barges weren't here anywhere, I don't think there would be any land above mean high water anywhere." He also explained, based on an aerial photograph, that there was "clear visual evidence that material has been deposited by human means. . . . [A]nd in this circle that's labeled as the thumb, there was also a dredge spoil disposal. And along the line between these

circles called the islet and barge debris, there was also a line of material deposited." Dr. Sherman concluded that, except for human activity, "this site would have been washed over routinely." Dr. Dupre, THI's expert, also testified that he identified evidence of dredge spoils in the three areas, including the area of the "thumb."

We hold that the evidence is both legally and factually sufficient to support the trial court's fact findings.

4. The Court Correctly Concluded as a Matter Of Law that Portions of Tract 1 Were Above Mean High Tide because of Self-Help.

Additionally, we agree with the trial court's conclusion of law concerning self-help. A private party may not acquire title through self-help that raises land from submerged land lying under tidal waters. *Brainard,* 12 S.W.3d at 19 ("A widely recognized exception to the general rule is that accretion does not belong to the owner of the land adjoining the water when the owner causes the accretion."); *York,* 532 S.W.2d at 952 ("A riparian or littoral owner may not acquire title to submerged land through self-help by filling and raising the land level."). An island arising out of the bed of a navigable stream or the submerged lands of a tidewater bay becomes the property of the State. *See Giles v. Basore,* 154 Tex. 366, 278 S.W.2d 830, 835 (1955); *Lakefront Trust, Inc.*

v. City of Port Arthur, 505 S.W.2d 606, 609 (Tex.App. – Beaumont 1974, writ ref'd n.r.e.).

THI contends that if dredge spoils were placed elsewhere along Old River, but then were washed onto Tracts 1 or 2 by the water, that would not constitute self-help depriving THI of the upland acreage. For this proposition, THI cites *Natland Corp. v. Baker's Port, Inc.,* 865 S.W.2d 52 (Tex.App. – Corpus Christi 1993, writ denied). THI also contends *Natland* supports its claim that the actions of the Carter Heir's lessees should not be attributed to THI. In that case, Natland's predecessor granted the Corps of Engineers a spoil disposal easement on which the Corps piled spoil from the dredging of the intracoastal waterway. The spoil was placed on dry land inland from the shore. *Id.* at 56. Over time, by the action of rain, wind, and gravity, some of the spoil gradually was washed from the piles toward the sea, extending the land seaward. *Id.* at 57. The *Natland* court held that the upland owner gained title to the land created by the gradual run-off of that material. *Id.* at 58. The court also held that the owner's granting of a dredging easement to the Corps of Engineers "was not sufficient participation by the owner to require forfeiture of his right to the resulting accretions under the principles of *Lorino.*" *Id.*

However, we have already determined that legally and factually sufficient evidence supports the trial court's findings, disputing THI's claim that the emergent areas were the product of accretions onto dry land. We also find *Natland* distinguishable on the

issue of self-help, because the grant of an easement to a government authority to dump dredge spoil from a project unrelated to the owner's property is not the equivalent of a lease to private entities to conduct barge fleeting and related dredging operations at the site.

We therefore overrule this issue. Having overruled each of THI's issues related to ownership of Tract 1, this concludes our discussion of that issue and we turn to the second broad issue in the case, the southern boundary of Tract 1.

II. Part 2: The Surveying Issues

We now consider the second part of THI's appeal, which concerns the location of the southern boundary of the J.T. Harrell survey. As the trial court found, Tract 1 is bounded by (1) the Jones-Hare line to the east (a vertical, north-south line), (2) the south line of the J.T. Harrell survey to the south (a horizontal, east-west line), and the meanders of Old River to the north and west. The location of the Jones-Hare line is undisputed. And, we have already determined that the 1838 meanders of the Old River cannot be located today. Therefore, the only remaining boundary issue is the location of the south line of the J.T. Harrell survey.[27]

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[27] To give a better visual of the location of the boundaries, assuming the property is very loosely in the shape of a triangle, we know the location of the vertical line (the Jones-Hare line),

(Continued on following page)

This issue was hotly contested by the parties, because THI's placement of the line – several hundred feet further south than the Port and Kirby locate it – gives THI more land in Tract 1 and could establish that Tracts 1 and 2 are contiguous. As discussed in greater detail in Part 3 of this opinion, the placement of the south line is central to THI's claim that it owns Tract 2.

THI raises five issues challenging the trial court's fact findings and conclusions of law, which adopt Foster's survey of the south line of the J.T. Harrell survey as the correct one and find Merten's survey incorrect and unreliable. In issues seven through nine, THI attacks Finding of Fact No. 20, set out below:

> The J.T. Harrell line is correctly located by the survey of Nedra Foster (Kirby Exhibit 2), which is incorporated herein as if set out verbatim. This is the same line as that found by the surveys of J.S. Boyles that were patented by the Texas General Land Office in 1936 and 1953.

THI contends (1) the trial court erred by concluding that the southern boundary of Tract 1 is correctly

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which is on the right side of the triangle, we know only in a very general sense the location of the diagonal (meandering) line (the meanders of the Old River to the north and west, which have been eroded away), and now we are attempting to set the location of the horizontal line at the bottom of the triangle (the south line of the J.T. Harrell survey).

located by Foster, (2) if Finding No. 20 is correctly a fact finding, there is no evidence, or alternatively, insufficient evidence to support it, and (3) the trial court committed harmful error by excluding evidence demonstrating errors in Boyles's surveys on which Foster relied.

In its tenth issue, THI challenges the trial court's finding that Merten's survey was incorrect and unreliable, and in its eleventh issue, THI contends there is no evidence, or alternatively, insufficient evidence to support the finding that the riparian boundaries of Tract 1 cannot be surveyed.[28]

A. The Facts Relating to the Relevant Historical Surveys.

In 1838, H. Trott surveyed a tract of public land conveyed by the Republic of Texas to J.T. Harrell. In 1845, Trott's survey was patented by the General Land Office ("GLO"). The description of the J.T. Harrell survey was as follows:

> . . . beginning at the mouth of Bear Bayou, at the point, Thence south 62 1/2 degrees west, 4300 varas to a stake and mound in the prairie the same being Carpenter & Harris

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[28] To the extent we have already addressed these two issues in Part 1 of this opinion, we will not revisit them; we will address only THI's issues concerning the placement of the south line of the J.T. Harrell survey.

> corner as corrected by order of the commissioner general. Thence east 5820 varas with this line to the San Jacinto River, Thence up the west bank of same as it meanders to the beginning. . . .[29]

Trott's survey, being the oldest survey of this property, is considered the senior survey of the J.T. Harrell grant; later surveys are considered junior to it. The property we know as Tract 1 was part of the J.T. Harrell grant.

In 1895, Tract 1 was severed from the larger tract and sold separately. Tract 1 was first described in the deed of May 27, 1895, from Mary Jones to J.P. McGee, and then described in the deed of February 15, 1896, from J.P. McGee to Emma Hudson. The Magee/Hudson deed of 1896 described the south boundary of Tract 1 as commencing at the Jones-Hare line (the north-south line forming the eastern boundary), "[t]hence west 1636' feet along the common line of the Harris and Carpenter league and the JT Harrell." Thus, the south line of the J.T. Harrell survey forms the south boundary of Tract 1.

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[29] Apparently, Trott's survey reflected an erroneous belief that the Harris/Carpenter grant extended north to a common boundary with the Harrell grant. A vacancy was later found to exist between the Harrell grant and the actual north boundary of the Harris/Carpenter. Therefore, the call for adjoinder to the Harris/Carpenter survey cannot be relied upon to find the southwest corner of the J.T. Harrell Survey.

Our record does not reflect another survey of this area until 1936, when J.S. Boyles, then the Harris County Land Surveyor, surveyed purported vacancies existing in areas west of Old River and south of the J.T. Harrell survey. To determine the extent of the vacant land, Boyles was required to fix the surrounding survey lines, including the south line of the J.T. Harrell survey. Boyles found the south line on the ground, reporting to the GLO that

> The J.T. Harrell can be located with a fair degree of accuracy, giving due recognition to [its] beginning call at the mouth of Bear Bayou. [Its] north line, while substantially 2 degrees off of [its] called course, is well marked and recognized on the ground. *The South line of the same is also well recognized and marked on the ground.* By taking the intersection of the two marked lines of the Harrell at their Western terminus, we find that this point is 1694.2 varas North of the Northeast corner of the Vince Survey and further that Trott in 1838 made this distance, in his survey of the Peter J. Duncan, 1700 varas, which is a very close check after a hundred years.

(emphasis added). Thus, Boyles was able to locate Trott's markings on the ground for the South line of the J.T. Harrell survey. Based upon Boyles's survey, a patent was issued for the W.T. Carter survey, located directly below the south line of the J.T. Harrell grant, and for the W.M. Buehler and B.N. Garrett surveys. The Buehler and Garrett surveys were immediately

below the Carter survey and had as their western borders a continuation of the western border of the Carter survey.[30]

In 1951, Boyles surveyed the unappropriated areas east of Old River, and based upon his survey, the State issued a patent to Mary Niedermeier for a 730.6-acre tract abutting and immediately south of the J.T. Harrell survey. The northern boundary of the Niedermeier survey is the J.T. Harrell south line.[31] Thus, both the Carter and Neidermeier surveys share the south line of the J.T. Harrell survey as their northern boundary, the Carter survey to the west and the Neidermeier survey to the east.

B. The Competing Surveys of the South Line by Merten and Foster.

The placement of the south line was disputed primarily because Trott's 1838 description did not

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[30] If one were to imagine three rectangles stacked neatly one on top of the other, the top rectangle represents the W.T. Carter survey, the middle rectangle represents the Buehler survey, and the bottom rectangle represents the Garrett survey. The top horizontal side of the top rectangle is the south line of the J.T. Harrell survey and the left vertical sides of the three rectangles form a single vertical (north-south) line.

[31] Niedermier sold a one-half interest in her 730.6-acre tract to the Port in 1952. In 1979, the Port condemned the remaining half interest in the uplands of the 730.6-acre tract then owned by the Carter Heirs. THI does not dispute that the Port owns all of the property immediately south of the south line of the Harrell survey.

include any calls to natural monuments or other objects that could be used today to locate the south line on the ground, and the description merely provided that from the southwest corner the line proceeded "[t]hence east 5820 varas . . . to the San Jacinto River."

1. Merten's Method of Locating the Line.

THI's surveyor, Merten, testified that, to locate the south line, he first sought to determine the location of the southwest corner of the J.T. Harrell survey. To do this, he found the north line of the Vince survey (which is south and west of the H.T. Harrell survey), "turned a record angle" based on Trott's field notes, and projected a line 1700 varas north. Merten then sought to trace the east line of the adjacent Duncan survey, which bounds the J.T. Harrell survey on the west, to find a common point.[32] From his southwest corner, Merten then "turned 90 degrees" and projected the J.T. Harrell south line "due east," based on Trott's "thence east" course call.

Merten also testified that he checked his work by determining that the relationship between the angle of the north line of the J.T. Harrell survey and the south line as he placed it was 27 1/2 degrees, which

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[32] Merten used Boyles's 1936 survey to find the general area from which he located the southwest corner, but otherwise he rejected Boyles's work as "highly unreliable" to use in locating the south line.

corresponded with Trott's call for the line (coming from the opposite direction) from Bear Bayou to the southwest corner to be on the course of "south 62 1/2 degrees west." By comparison, Merten explained that the angle between Foster's placement of the north and south lines was 25 degrees, as opposed to Trott's 27 1/2 degrees, and her south line did not run due east.

Merten testified that using record angles was an appropriate method to use to reconstruct a survey when there are no marks on the ground or possession lines that can be connected to the senior survey.[33] Merten acknowledged, however, that from where he placed the southwest corner of the J.T. Harrell survey, his north-south survey line would not correspond with the existing west line of the Carter, Buehler, and Garrett surveys.

2. Foster's Method of Locating the Line.

Foster testified on behalf of the Port and Kirby concerning her placement of the J.T. Harrell south

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[33] Merten actually did two surveys, one in May of 2003, and one in September of 2003. He testified that in the September 2003 survey, he placed the south line 10 feet further north than he did in the May 2003 survey. He also moved the Jones-Hare line 23 feet further east, to be in agreement with the other surveyors' placement of the line. According to Foster, Merten also placed the southwest corner in May 2003 some 137 feet away from where he placed it in September 2003, and his final placement of the point was 83 feet east of Boyles' and Foster's location of the point. THI relies on the second survey.

line. Foster explained that she set out to find Trott's footsteps on the ground to reestablish his line. Foster testified that she began her survey by locating the calls to the natural objects identified in Trott's 1838 survey, such as the mouth of Bear Bayou and the San Jacinto River. She explained that, because other marks Trott made were gone, she also looked at Boyles's surveys and field notes, and explained that Boyles "had of necessity found the established lines of the senior surveys. And so we also looked at his work where he had found Mr. Trott. The perpetuation of that survey."

She located the southwest corner by locating Boyles's marks on the ground: "When Boyles ran the lines and found the marks left on the ground, he said that he ran it to an intersection out to the west, and he said that it was 7.4 varas south of the intersection of the railroad and Sheldon Road." Foster testified she located this exact point. Foster then located Boyles's calls for objects along the south line, fixing her south line at the same location as Boyles. Foster further testified that although the junior surveys agreed with Trott's senior survey, she was not using the junior surveys to find the J.T. Harrell south line; she was using Trott's survey of the J.T. Harrell grant.

Foster also testified that she had worked in the area previously, and in 1988 had located the north and south lines of the J.T. Harrell survey in the course of her work. In conducting the survey for this litigation, she checked her earlier work to confirm she had done it correctly. Foster testified she found the

south line in the same location where she had located it in 1988.

Foster criticized Merten's reliance on "turning angles" as inappropriate for use in retracing a survey's boundaries. She acknowledged that the bearings on her survey were not exactly 62 1/2 degrees, but stated that bearings were just a guide and were not controlling; rather, what controlled was "the marked line on the ground." Foster also testified that her survey located the south line in the same place as Trott's 1838 survey and Boyles's 1936 and 1951 surveys, and her placement of the south line created no conflicts with the adjacent surveys in the area.

As placed, Foster's line was approximately 325-400 feet further north than Merten's line.

C. The Law Controlling Surveys and Surveyors.

THI contends the issue of which surveyor correctly surveyed the line is a matter of law. It claims that Trott's survey of 1838 is the senior survey and must control the location of the south line. According to THI, Merten followed well-established law by using Trott's survey to draw the south line due east from the southwest corner of the J.T. Harrell grant. THI contends Foster disregarded Trott's survey and improperly relied on junior surveys to mark Trott's senior survey. Alternatively, THI argues that if the issue is not a matter of law but a fact issue, then (a) there is no evidence or legally insufficient evidence

to support the trial court's fact finding that Foster correctly surveyed the southern boundary of Tract 1, and (b) the trial court abused its discretion by not permitting THI to introduce evidence that would demonstrate that Boyles erred in drawing his lines.

1. The Location of the J.T. Harrell South Line is a Question of Fact.

We first address THI's argument that the correctness of the surveyors' work is a matter of law. Texas law is well settled that unless the facts are undisputed, the location of a survey line, as it was run on the ground by the original surveyor, is a question of fact for the jury. *See East Tex. Pulp & Paper Co. v. Cox,* 381 S.W.2d 78, 83-85 (Tex.Civ.App. – Beaumont 1964, writ ref'd n.r.e); *Angelina County Lumber Co. v. McKnight,* 265 S.W.2d 246, 249-50 (Tex.Civ.App. – Waco 1954, writ ref'd n.r.e.). The Texas Supreme Court has explained that "[a]s to what are boundaries, is a question of law for the determination of the court; as to where the boundaries are upon the ground, is a question of fact to be determined from the evidence." *Farley v. Deslonde,* 58 Tex. 588, 591 (1883).

THI cites *Brainard v. State,* 12 S.W.3d at 26, for the proposition that the choice between legally correct and incorrect surveys is a question of law. We conclude *Brainard* does not control here. In *Brainard,* the question was the location of the boundary dividing private property from state property. The

boundary was in dispute not because of competing surveys, as here, but because the width of the river had narrowed significantly from 3400 feet to 20-50 feet. *Id.* at 12. The Court had to decide whether the boundary should be based on the present-day riverbed, as advocated by the landowners, or the "natural" riverbed as it existed before the dam was closed. *Id.* at 10-11. The Court held as a matter of law that the boundary line was the present-day riverbed, not the so-called "natural" riverbed, because the State owns the riverbed, and held that the State's survey of the "natural" riverbed did not reveal the true property line. *Id.* at 10, 26. Thus, the State's survey was immaterial, and did not raise a fact issue, because it was not a survey of the boundary line.

In contrast, everyone agrees that the J.T. Harrell survey line is the property line of Tract 1. The only question is which of the competing surveys accurately shows the location of the line as found by H. Trott in 1838. This question is a question of fact. *See Farley v. Deslonde,* 58 Tex. at 591. We therefore briefly review the applicable law and turn to THI's legal and factual sufficiency arguments.

2. The Law Governing How to Find the Original Surveyor's Footsteps.

When finding the lines of a survey, "[t]he cardinal rule is that the footsteps of the original surveyor, if they can be ascertained, should be followed." *Hurr v. Hildebrand,* 388 S.W.2d 284, 288 (Tex.Civ.App. –

Houston 1965, writ ref'd n.r.e.); *see also Humble Oil & Ref. Co. v. State,* 162 S.W.2d 119, 132 (Tex.Civ.App. – Austin 1942, writ ref'd) ("The primary objective in locating a survey is to 'follow the footsteps of the surveyor'; by which is meant to trace on the ground the lines as he actually ran them in making the survey."). If the actual lines and corners run by the original surveyor can be found, they are controlling, even if they are inconsistent with the calls and references in that surveyor's field notes. *See Wheeler v. Stanolind Oil & Gas Co.,* 151 Tex. 418, 252 S.W.2d 149, 151 (1952) (stating that the footsteps of the original surveyor are controlling and prevail over calls for course and distance); *Thatcher v. Matthews,* 101 Tex. 122, 105 S.W. 317, 318 (1907), (stating that when the actual lines run by the surveyor can be found, they constitute the true boundary and cannot be made to yield to course and distance calls); *Teal v. Powell Lumber Co.,* 262 S.W.2d 223, 226-27 (Tex.Civ.App. – Beaumont 1953, no writ) (stating that "if the footsteps of the original surveyor can be identified and followed, they will control the location of the line or boundary in question even though they may not be in harmony with the field note calls").

When one can locate on the ground with certainty and without inconsistency the objects or monuments designated by the original surveyor "as marking the lines he actually traced . . . , the survey must be laid out from those points, and extraneous evidence cannot be admitted to contradict the assertion of the surveyor that he actually went to the

points he so designated." *Humble Oil,* 162 S.W.2d at 132-33. However, if the location of the actual footsteps of the surveyor cannot be established with reasonable certainty, "all the surrounding facts and circumstances should be considered in order to arrive at the purpose and intent of the surveyor who made the original survey." *Hurr,* 388 S.W.2d at 288.

Thus, although the original surveyor's marks and calls are generally controlling, when the surveyor's marks have disappeared over time, the lines and corners of the survey may be established using any evidence tending to show their location that is "the best evidence of which the case is susceptible." *See, e.g., City of Carrollton v. Duncan,* 742 S.W.2d 70, 72, 76-77 (Tex.App. – Fort Worth 1987, no writ); *Angelina County Lumber Co. v. McKnight,* 265 S.W.2d 246, 249-50 (Tex.Civ.App. – Waco 1954, writ ref'd n.r.e.); *Taylor v. Higgins Oil & Fuel Co.,* 2 S.W.2d 288, 300 (Tex.Civ.App. – Beaumont 1928, writ dism'd w.o.j.). Courts generally consider the "best evidence" to be "that evidence which is the more specific and definite as against that which is merely general and indefinite or descriptive." *Taylor,* 2 S.W.2d at 300.

D. The Trial Court's Decision to Adopt Foster's South Line is Supported by the Evidence.

1. Although Foster Used Boyles's Junior Survey, She Did Not Improperly Rely on It.

THI contends Foster improperly relied on Boyles's junior surveys to mark Trott's senior survey.

THI cites *Strayhorn v. Jones,* 157 Tex. 136, 300 S.W.2d 623, 630 (1957), for the proposition that the description in the senior survey controls when locating a line of that survey over any junior survey of that line, unless the evidence proves that the senior survey is in error.

Because there is no evidence that Trott made an error in describing the Harrell line, THI contends, Merten correctly performed his survey by relying on Trott's "thence east" course call. However, courts have held that, when the original surveyor's marks can no longer be found, the calls and recitals in a junior survey may be the best evidence of the original boundaries of the senior survey. *Dixon v. Dewhurst,* 169 S.W.3d 515, 518-19 (Tex.App. – Texarkana 2005, no pet.); *Hill v. Whiteside,* 749 S.W.2d 144, 152 (Tex.App. – Fort Worth 1988, writ denied) (per curiam); *Barnes v. Wingate,* 342 S.W.2d 352, 357 (Tex.Civ.App. – Beaumont 1960, writ dism'd). Further, when a subsequent surveyor is shown to have found the natural and artificial objects called for in a senior survey, and to have re-marked those lines and corners in the same location, that subsequent survey will assume the dignity of the original. *Humble Oil,* 162 S.W.2d at 133; *Taylor,* 2 S.W.2d at 301. So, although a junior survey cannot be used to create an ambiguity in or to change the lines of a senior survey, *Kirby Lumber Corp. v. Lindsey,* 455 S.W.2d 733, 739 (Tex. 1970), it may be used as evidence of the location of the lines of a senior survey. *Dixon,* 169 S.W.3d at 518-19; *Hill,* 749 S.W.2d at 152.

Foster testified that she sought to find Trott's footsteps on the ground. One of the ways she did that was to find the perpetuation of Trott's survey by looking to county surveyor Boyles's patented surveys, which in turn were based on Trott's survey, to locate the south line of the J.T. Harrell grant. Foster found that, in 1936 and again in 1951, Boyles surveyed the south line of the J.T. Harrell survey as part of his survey of untitled vacancies immediately to the south of that line. Boyles reported at the time that the line was "well marked and recognized on the ground," and filed detailed survey and field notes with the GLO that were the basis for the Carter, Buehler, Garrett, and Neidermeier patents. Boyles's surveys of the vacancies expressly called for a common line with the J.T. Harrell Survey, and detailed physical objects and markings along that line. Using Boyles's surveys and field notes, Foster retraced the south line of the J.T. Harrell survey, just as she had done in 1988 in a survey not prepared for litigation. Foster did not improperly rely on Boyles's junior survey.

2. Boyles Located Trott's Marks for the South Line of the J.T. Harrell Grant.

THI also complains that Foster wrongly assumed Boyles necessarily established the lines of Trott's senior survey when surveying the boundaries of other tracts. THI notes that in Boyles's 1936 survey, he reported that the south line of the J.T. Harrell was "well marked and recognized on the ground," but asserts that there is nothing to connect any marks

that Boyles may have found to Trott's survey, and that, after the passage of 98 years between Trott's 1838 survey and Boyles's 1936 survey, there can be no presumption that any marks left were Trott's work.[34]

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[34] In support of these arguments, THI cites *Gill v. Peterson*, 126 Tex. 216, 86 S.W.2d 629 (1935); *Wood v. Stone*, 359 S.W.2d 68 (Tex.Civ.App. – Houston 1962, writ ref'd n.r.e.); *Teal v. Powell Lumber Co.*, 262 S.W.2d 223 (Tex.Civ.App. – Beaumont 1953, no writ); and *Boyt v. Weiser*, 180 S.W.2d 953 (Tex.Civ.App. – Amarillo 1944, writ ref'd). However, these cases merely illustrate that the general rules have to be applied based on the court's evaluation of the facts and evidence in each case. For example, in *Gill*, the court noted the general rule that "the location of lines or corners of a survey may not be established or controlled by artificial objects or marks not called for in the field notes," but found no error in allowing the surveyor to testify about where he placed marks not referred to in field notes when that evidence aided in locating the surveyor's line. *Gill*, 86 S.W.2d at 631, 632. In *Wood*, the court found no competent evidence that two tracts were adjacent when the junior surveyor was shown to have no knowledge of the line of the senior survey or any common corners. *Wood*, 359 S.W.2d at 74-75. In *Teal*, the court held that a survey calling for the property to adjoin that of a senior survey was not entitled to the presumption that the surveyor actually surveyed and found the line of the senior survey when there was no evidence the surveyor had any knowledge of the senior survey's line or corners, and all competent evidence was to the contrary. *Teal*, 262 S.W.2d at 237-40. Finally, in *Boyt*, the court held that a piece of flat iron, first seen as a corner marker fifty-eight years after the original surveys of the area were made, and which was not connected in any way to the surveys, was no evidence of the corner's location, and, because of the ambiguities in the original surveys' field notes and uncertainty about the piece of flat iron, the trial court properly admitted parol evidence to establish the south line of the property at issue. *Boyt*, 180 S.W.2d at 55-56 [sic].

However, Boyles stated that he was able to find Trott's line, and Foster found where Boyles perpetuated that line. Surveyors are presumed to have performed their official duties and to have actually surveyed and marked all the lines to the corners. *See State v. Sullivan,* 127 Tex. 525, 92 S.W.2d 228, 232 (1936) (stating that a surveyor is presumed to have done his official duties); *East Tex. Pulp & Paper Co.,* 381 S.W.2d at 84 (stating that absent proof to the contrary, it is presumed the original surveyor performed his duties, including marking the lines). This is particularly true after their work has been accepted by the GLO. *See State v. Sun Oil Co.,* 114 S.W.2d 936, 945-46 (Tex.Civ.App. – Austin 1938, writ ref'd) (stating that after an extended lapse of time, and issuance of a patent, the county surveyor should be presumed to have properly discharged his official duties). No evidence indicates the line Boyles found was not Trott's line. Additionally, the GLO accepted Boyles's survey and field notes, and the State of Texas issued patents based on those surveys and field notes.

3. The Trial Court Did Not Abuse Its Discretion by Excluding Boyles's 1951 Field Book and the Testimony of Bouse.

THI also contends the trial court erred in excluding Boyles's 1951 field book and the testimony and exhibits of surveyor Bouse, which THI contends demonstrated errors in Boyles's survey. We review the trial court's exclusion of evidence for abuse of discretion. *City of Brownsville v. Alvarado,* 897 S.W.2d 750,

753 (Tex. 1995). Boyles's field book, which was not patented – unlike Boyles's survey and field notes – was properly excluded because the patented survey and field notes control over unpatented field books. *See Stanolind Oil & Gas Co. v. State,* 129 Tex. 547, 101 S.W.2d 801, 808 (1937). Excluding Bouse's testimony and exhibits also was proper because the trial court was enforcing a pre-trial order (sought by THI) limiting each party to one surveying expert, and THI chose Merten over Bouse. Even if the trial court had abused its discretion, however, THI makes no effort to argue or demonstrate that any error was reasonably calculated and probably did result in an improper judgment. *See* TEX.R.APP. P. 44.1(a).

4. Merten's Reliance on Certain Calls in Trott's Survey Was Not the Only Correct Way to Locate the South Line of the J.T. Harrell Survey.

We turn next to THI's claim that Merten's reliance on Trott's "thence east" course call was the only correct manner of surveying the south line of the J.T. Harrell survey, and that Foster improperly disregarded Trott's course call. As support for this proposition, THI cites the following statement from *Kirby Lumber Co. v. Adams,* 127 Tex. 376, 93 S.W.2d 382, 385 (1936): "[W]here the natural and artificial objects of the grant cannot be identified upon the ground, the proper method of locating the lines and corners will be by course and distance from the nearest recognized and established corner or artificial object with which

the field-notes are connected." THI also cites the order of preference courts give to the dignity of surveyors' calls: (1) natural objects; (2) artificial objects; (3) course; and (4) distance. *See Mohnke v. Greenwood,* 915 S.W.2d 585, 591 (Tex.App. – Houston [14th Dist.] 1996, no writ). Because no marks or monuments can now be found along the south line, THI argues, Trott's unambiguous course call must control.

The rule THI relies on, however, does not control when other evidence is available from which the actual location of the survey line can be established. *See Wheeler,* 252 S.W.2d at 151; *Thatcher,* 105 S.W. at 318; *Teal,* 262 S.W.2d at 226-27. Here, Foster found and followed Trott's footsteps. Foster placed the south line at the same location that Boyles found Trott's original marked line, and there are no overlaps or conflicts among these surveys.

In addition, Merten acknowledged that Foster's placement of Trott's south line matches Boyles's 1936 and 1951 locations of that line, and matches the location of the Carter, Buehler, and Garrett surveys. Long-recognized and established boundaries will be disturbed only upon the most cogent and compelling evidence. *See Strong v. Delhi-Taylor Oil Corp.,* 405 S.W.2d 351, 375-76 (Tex.Civ.App. – Corpus Christi 1966, writ ref'd n.r.e.) (citing *Blaffer v. State,* 31 S.W.2d 172, 191 (Tex.Civ.App. – Austin 1930, writ ref'd)); *see also Kenedy Mem'l Found.,* 90 S.W.3d at 281 ("*[S]tare decisis* is never stronger than in protecting land titles, as to which there is great virtue in certainty.").

Merten, in contrast, disregarded Trott's physical call to the mouth of Bear Bayou – an existing natural object named in Trott's survey – as the starting point, and instead found a point he believed to be the southwest corner of the J.T. Harrell survey and drew a "due east" line across the area. Merten acknowledged that a surveyor goes out in the field to find the lines as they were marked on the ground, and agreed that one way to find the original surveyor's marks in the field is to see how those marks have been perpetuated over time. But, Merten did not traverse all of the survey lines he placed to look for marks. Instead, he merely turned an angle and looked at bearings.

Both Merten and Foster agreed that the course calls in a survey can vary from one surveyor to the next. Foster testified that bearings are just a guide, and even Merten acknowledged that it is "very common for two different surveyors to be surveying the same line and have a call for a different bearing." Bearings and course calls should not be used to establish the location of a survey line if there is other reliable evidence showing where it was actually run on the ground. *See Wheeler,* 252 S.W.2d at 151 (footsteps of original surveyor control over calls for course and distance); *Thatcher,* 105 S.W. at 318 (where actual lines run can be found, they constitute the true boundary and cannot be made to yield to course and distance calls).

Based on the foregoing, we hold that the hotly contested issue of the location on the ground of the

south line of the J.T. Harrell survey was a fact issue for the trial court to determine. We further hold that the evidence is legally and factually sufficient to support the trial court's Finding No. 20, and its finding that Merten's location of the south line of the J.T. Harrell survey was incorrect. We also hold THI has not demonstrated the trial court reversibly erred in excluding its proffered evidence.

We therefore overrule THI's issues seven through eleven.

III. Part 3: The Summary Judgments on Tract 2.

In the third part of its brief, THI raises three issues all related to the ownership of Tract 2: In its twelfth issue, it contends the trial court erred when it granted the Port's motions for summary judgment and Kirby's motion for summary judgment in part, determining that THI did not own Tract 2. In its thirteenth issue, THI contends the trial court also erred by not granting its motion for partial summary judgment on its claimed ownership of Tract 2. Finally, in its fourteenth issue, THI contends the trial court erred when it refused to admit evidence from a newly designated photogrammetry expert, Wayne Grip.

THI's only claim of ownership on appeal depends for its success on Tracts 1 and 2 being contiguous. As we explain below, Kirby and the Port moved for summary judgment, in part, arguing just the opposite – that Tracts 1 and 2 are not contiguous. Thus, they argued, if the strip-and-gore doctrine were to apply, it

could not apply in THI's favor. We hold that Tracts 1 and 2 are not contiguous and therefore Tract 2 could not have passed as a strip or gore with Tract 1. Because we agree with Kirby and the Port that the strip-and-gore doctrine, if applicable, does not apply in THI's favor, we hold that the trial court properly granted Kirby and the Port's motions for summary judgment, and also properly denied THI's motion. We also determine that excluding Grip's affidavit was not an abuse of discretion.

A. Procedural History and Background.

All three parties filed motions for summary judgment. THI and Kirby both claimed to own Tract 2. Kirby also pleaded in the alternative simply that THI did not own Tract 2. The Port moved for summary judgment claiming only that neither THI nor Kirby owned Tract 2. Ultimately, the trial court concluded THI did not own Tract 2, though it did not determine who owned the tract. The trial court did not identify any particular basis for its ruling.[35]

Kirby and the Port advanced four bases upon which summary judgment could be granted in their favor: (1) the 1896 deed from Hudson to Magee did

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[35] Kirby has not contested the trial court's denial of its motion for summary judgment that it owns Tract 2. Therefore, we are presented only with the question of whether the trial court properly granted the Port's motion to determine THI did not own Tract 2, or if the trial court should have granted THI's motion.

not effectively reserve Tract 2 for Hudson's estate; (2) the strip-and-gore doctrine does not apply; (3) if the strip-and-gore doctrine applies, it does not apply in THI's favor; and (4) Tract 2 never truly existed, but was instead located south of the J.T. Harrell line and thus already owned by the Port. These are the four possible bases to support the trial court's grant of summary judgment in appellees' favor. We hold that the third basis is adequate to support the trial court's ruling.

THI advanced several theories for why it owned Tract 2 and thus should receive summary judgment in its favor. These included the following: its predecessors in interest acquired title by adverse possession, the Carter heirs quitclaimed the property to THI, the land was passed under a theory of "more or less" language included in the 1905 deed, and the land was a strip or gore that passed with the 1905 deed.

The Port and Kirby claim that THI has not addressed all possible bases upon which we could affirm summary judgment, and thus we must affirm due to waiver. *See Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970); *see also F.M. Props. Operating Co. v. City of Austin*, 22 S.W.3d 868, 872 (Tex. 2000) (stating that when a trial court does not specify the grounds on which summary judgment was based, we must affirm if any of the grounds raised was meritorious). We have carefully reviewed the record and briefing to this court, and we disagree that the issue is waived. THI has attacked all possible

bases Kirby and the Port presented upon which we could affirm, and has also presented its own theory upon which it believes we could render summary judgment in its favor or remand for a trial – the strip-and-gore doctrine.[36]

To reverse the trial court's ruling and hold that THI should have received summary judgment in its favor, we must determine that THI's proffered basis of the strip-and-gore doctrine supports its argument that it should have received summary judgment in its favor. However, if Kirby and the Port are correct that the strip-and-gore doctrine cannot apply in THI's favor, then we must affirm the trial court's grant of summary judgment in Kirby and the Port's favor, and its denial of summary judgment in THI's favor. We disagree with THI that the strip-and-gore doctrine would apply to grant it ownership to Tract 2 because the tracts are not contiguous; therefore, we affirm summary judgment.

B. Standard of Review.

We review the trial court's summary judgment ruling de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005). In our review, we take as

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[36] THI mentions the Carter heirs' quitclaim deeds and adverse possession in its Statement of Facts Pertaining to Tract 2. However, it provides no argument, and no appropriate citations to the record and authorities regarding these theories of ownership. Therefore, they are not properly presented on appeal.

true all evidence favorable to the nonmovant, and indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Id.* When the parties moved for summary judgment on the same issues, as they did in this case, we consider the summary judgment evidence presented by all sides, determine all questions presented, and, if the trial court erred, render the decision the trial court should have rendered. *See id.* We hold that the trial court did not err.

C. The 1896 and 1905 Deeds.

Kirby and the Port argue that Tract 2 passed from Hudson to Magee in 1896. At that time, Hudson, a minor, owned a significant amount of land including: Tract 1; a 107 acre parcel of land north of the J.T. Harrell line that included the 6.1 acres comprising Tract 2; and 800 acres located south of the J.T. Harrell line and which is contiguous with Tract 2. Hudson's guardian, Farmer, executed a deed selling "all that tract or parcel of land containing 100 9/10 acres out of the north part of 107. . . . " The deed also contains a metes and bounds description of the land conveyed. Then, in 1905, Farmer executed another deed conveying to Donaldson and Hart Tract 1 and 800 acres south of the J.T. Harrell line. Although no other deeds are recorded transferring Hudson's land between 1896 and 1906, Farmer's inventory of Hudson's estate filed in 1907 did not list the 6 1 acres of Tract 2 as realty Hudson owned. Thus, question the parties attempted to answer below was: what happened to Tract 2?

Kirby and the Port contend Tract 2 passed by the 1896 deed because that deed was ineffective to reserve any portion of the 107 acres. THI counters that the 1896 deed was effective to reserve 6.1 acres – Tract 2 – and that the land passed as a strip or gore with the 1905 conveyance to Donaldson and Hart.

THI cannot maintain its claim of ownership under the strip-and-gore doctrine without first proving that the 6.1 acres were effectively reserved. However, we need not determine whether or not the reservation was effective because we hold that, even if it was effectively reserved, THI could not own the property under the strip-and-gore doctrine. Therefore, for purposes of our analysis, we will assume *arguendo* that the 1896 deed was an effective reservation 6.1 acres.

D. The Strip-and-Gore Doctrine Does Not Apply to Tracts 1 and 2.

The strip-and-gore doctrine is intended to avoid litigation by presuming that "a grantor has no intention of reserving a fee in a narrow strip of land *adjoining the land conveyed* when it ceases to be of use to him, unless such fee is clearly reserved." *Cantley v. Gulf Prod. Co.*, 135 Tex. 339, 143 S.W.2d 912, 915 (1940) (emphasis added). The doctrine applies only "to relatively narrow strips of land, small in size and value in comparison to the *adjoining tract* conveyed by the grantor." *Angelo v. Biscamp*, 441 S.W.2d 524, 526-27 (Tex. 1969) (emphasis added). Therefore, if the

land conveyed does not adjoin the strip or gore, the doctrine does not apply.

Here, the trial court's placement of the J.T. Harrell south line precludes any application of the strip-and-gore doctrine. As the exhibits attached to the findings of fact and conclusions of law show, Tracts 1 and 2 are not contiguous. In addition, no party argues that Tracts 1 and 2 were ever contiguous in 1896 or 1905 at the J.T. Harrell south line, and THI has not pointed us to a place in the record containing proof of contiguousness in 1896 or 1905.[37] Tract 2 is contiguous with the land to its north, and the 800 acres to its south, which the Port owns. As a result, if it is a strip or gore, it must pass with the land adjoining it, which Tract 1 does not.

THI has not argued on appeal any other legal basis on which it should receive summary judgment. Having determined that Tracts 1 and 2 are not contiguous as required by the strip-and-gore doctrine, we hold that the trial court properly granted summary judgment in Kirby and the Port's favor, and correctly denied THI's motion.

E. The Grip Affidavit.

The trial court placed the J.T. Harrell south line during the first part of the bifurcated trial. That line,

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[37] By "J.T. Harrell line" we refer to the trial court's placement of that line, which we affirmed in Part II of this opinion.

as is shown clearly in the exhibits attached to the findings of fact and conclusions of law, shows the south line's location and also shows that Tracts 1 and 2 are not contiguous, adjoining tracts.

During the summary judgment phase, THI claimed that the appellees had introduced a "voodoo" exhibit, which moved the south line by several hundred feet to the north. To prove their point, they attempted to introduce expert evidence via a photogrammetry expert, Wayne Grip, who would have placed the south line in a different location. However, Grip's affidavit would have served only as an attempt to relitigate the location of the J.T. Harrell grant south line. The trial court had already heard extensive expert testimony regarding the location of the south line. It made a finding on that issue and incorporated exhibits depicting where the line lay on the ground. As a result, Grip's affidavit – which served only to refute the placement of that line – was unnecessary and it was within the trial court's discretion to exclude it. *See Vela v. Wagner & Brown, Ltd.*, 203 S.W.3d 37, 52 (Tex.App. – San Antonio 2006, no pet.) (we review a trial court's decision to admit or exclude expert evidence under and abuse of discretion standard). We overrule appellant's summary judgment issues.

IV. Conclusion

We overrule THI's issues and affirm the trial court's judgment.

/s/ Wanda McKee Fowler
Justice

Judgment rendered and Corrected Opinion filed February 1, 2007

Panel consists of Justices Hudson, Fowler, and Seymore.

CAUSE NO. 2003-12846

KIRBY INLAND MARINE, L.P.	§ IN THE DISTRICT § COURT OF
V.	§ HARRIS COUNTY, TEXAS § 269TH JUDICIAL
TH INVESTMENTS, INC.	§ DISTRICT

FINAL JUDGMENT

(Filed Feb. 2, 2005)

CAME ON TO BE CONSIDERED the Motion for Entry of Final Judgment filed by the Port of Houston Authority of Harris County, Texas (the "Port Authority"). After considering the Port Authority's Motion for Entry of Final Judgment, this Court finds that the Port Authority's Motion should be GRANTED. It is therefore ORDERED, ADJUDGED, and DECREED that the Port Authority's Motion for Entry of Final Judgment is in all things GRANTED, and this Court hereby enters the following:

BE IT REMEMBERED that this action was initially brought by Kirby Inland Marine, L.P. ("Kirby") against TH Investments, Inc. ("THI"), and that Kirby later joined the Port Authority. Thereafter, the Parties asserted various cross- and counter-claims against each other, as reflected by the pleadings on file herein;

BE IT FURTHER REMEMBERED that the claims in this cause involve the title, ownership, and location of two tracts of land bordered by Old River

and the San Jacinto River in Harris County, Texas. The first tract – the "27 Acre Tract" – is the remnant of 27-acres, more or less, lying submerged beneath the waters of Old River. The second tract – "Tract 2" – is alleged to be comprised of 6.1-acres of partially submerged and partially emergent lands lying along the west bank of the San Jacinto River;

BE IT FURTHER REMEMBERED that the "27 Acre Tract" was claimed by THI as being twenty-seven acres of land, more or less, as originally described in the February 17, 1896 Deed from Emma Hudson to J.P. Magee at Vol. 88, Page 590; the November, 2002 Deed from ~~TH Investments, Inc.~~ [the Carter Heirs /s/ JTW], to ~~the Carter Heirs~~ [TH Investment, Inc. /s/ JTW], at Vol. 559, Page 36, 2519rpr and the December, 2003 Correction Deed from the Carter Heirs to TH Investments, Inc., at file number X228077; and that "Tract 2" was claimed by THI as being that tract of land described in: (1) the quitclaims from the Carter Heirs to TH Investments, Inc., at Vol. 559, Page 36, 2519rpr, and supplemented by the correction quitclaims from the Carter Heirs to TH Investments, Inc., at file number X228080, and (2) being described in the quitclaims from the Hudson Heirs to TH Investments, Inc., at file number X795904.

BE IT FURTHERED REMEMBERED that the court, with the agreement of the Parties, separated this cause into two phases, with "Phase 1" addressing the "27 Acre Tract" and "Phase 2" addressing "Tract 2."

BE IT FURTHER REMEMBERED that "Phase 1" came on for trial on the merits before the Court without a jury on March 30, 2004, all Parties to the above-captioned case having agreed to a separate trial to the bench of all issues of fact concerning the ownership and boundaries of the "27 Acre Tract" made the basis of TH Investments, Inc.'s ("THI's) claims. All of the Parties and their attorneys were present and announced ready. On April 12, 2004, the evidence concluded, the Parties rested, and the Court heard the argument of counsel. After considering the evidence, the pleadings, and the argument and briefs of counsel, the Court, in response to requests made by the Parties for findings of fact and conclusions of law, and in accordance with Rule 296 of the TEXAS RULES OF CIVIL PROCEDURE, entered and signed its Findings of Fact and Conclusions of Law on April 22, 2004 in "Phase 1." These Findings of Fact and Conclusions of Law, attached hereto as **Exhibit A**, are fully incorporated herein by reference as if set out verbatim. The Court denied THI's Motion to Reconsider and/or Clarify these Findings of Fact and Conclusions of Law Regarding Submergence of "Tract 1" and Self-Help on November 11, 2004.

BE IT FURTHER REMEMBERED that after the Court entered its Findings of Fact and Conclusions of Law, the Parties filed cross-motions for summary judgment on "Tract 2," namely THI's Motion for Partial Summary Judgment on Kirby's Claim of Ownership of "Tract 2"; THI's Motion for Partial Summary Judgment on THI's Claim of Ownership of

"Tract 2"; Kirby's Motion for Summary Judgment on Phase Two – Title to the Riverbank; the Port Authority's Motion for Summary Judgment on THI's claim of Record Title to "Tract 2" and Kirby's Claim of Ownership of "Tract 2"; and the Port Authority's Motion for Summary Judgment on THI's Claim of Record Title to the "Tract 2" 6.1-Acres. The Parties also filed voluminous responses, replies, and supplemental papers concerning these motions. Having considered these many filings, the Court granted the Port Authority's Motion for Summary Judgment on THI's Claim of Record Title to "Tract 2" and Kirby's Claim of Ownership of "Tract 2." The orders granting the Port Authority's Motions for Summary Judgment are fully incorporated herein by reference as if set out verbatim. Additionally, the Court granted Kirby's Motion for Summary Judgment on Phase Two – Title to the Riverbank in part, to the limited extent that ~~it is premised on the same grounds and seeks the same relief as the Port of Houston Authority's Motion for Summary Judgment on THI's~~ [THI's /s/ JTW] Claim of Record Title to the "Tract 2" 6.1 Acres ~~provided that no ruling is made hereby on Kirby's claims for summary judgment based on adverse possession or the 1929 Quiet Title Action~~ [is denied. It is further ordered that Kirby's Motion seeking title to "Tract 2", 6.1 acres, is denied /s/ JTW]. The order granting in part Kirby's Motion for Summary Judgment is fully incorporated herein by reference as if set out verbatim.

The Port Authority has moved for judgment, contending that the Findings of Fact and Conclusions of Law, the summary judgment Orders, and a Stipulation agreed to by the Port Authority and Kirby and filed among the papers of this cause, taken together, dispose of all issues presented by the case. The Court concurs, and on the basis of such findings and conclusions, orders, and stipulations, IT IS:

ORDERED, ADJUDGED, and DECREED that as to all claims involving the "27 Acre Tract," TH Investments, Inc., do have and recover nothing of and from Kirby Inland Marine, L.P. and the Port of Houston Authority of Harris County, Texas; it is further

ORDERED, ADJUDGED, and DECREED that ownership of the "27 Acre Tract" is fully vested in the Port of Houston Authority of Harris County, Texas, as successor to the State of Texas; it is further

ORDERED, ADJUDGED, and DECREED that the South Line of the J.T. Harrell Survey in Harris County, Texas, is as shown by Licensed State Land Surveyor Nedra Foster in Kirby Trial Exhibits 1 and 2, copies of which are attached as **Exhibit B**, and made a part hereof, incorporating the J.S. Boyles patented surveys of 1936 and 1951; it is further

ORDERED, ADJUDGED, and DECREED that as to "Tract 2" (alleged to be 6.1-acres), TH Investments, Inc., do have and recover nothing of and from Kirby Inland Marine, L.P. and the Port of Houston Authority of Harris County, Texas; it is further

ORDERED, ADJUDGED, and DECREED that TH Investments, Inc., does not own and does not possess record title to "Tract 2" (alleged to be 6.1-acres), as claimed by THI; it is further

ORDERED, ADJUDGED, and DECREED that as between the Port of Houston Authority of Harris County, Texas, and Kirby Inland Marine, L.P., all claims to ownership of those uplands lying east of the Jones-Hare Line and north of the true South Line of the J.T. Harrell Survey are dismissed without prejudice pursuant to their Stipulation.

All relief not expressly granted herein is hereby denied. This is a final and appealable judgment.

SIGNED this ___ day of FEB 02, 2005, 2005, in Harris County Texas.

/s/ John T. Wooldridge
Hon. JOHN T. WOOLDRIDGE
JUDGE PRESIDING

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CAUSE NO. 2003-12846

KIRBY INLAND MARINE, L.P.	§ IN THE DISTRICT § COURT OF
V.	§ HARRIS COUNTY, TEXAS § 269TH JUDICIAL
TH INVESTMENTS, INC.	§ DISTRICT

FINDINGS OF FACT AND CONCLUSIONS OF LAW

(Filed Apr. 22, 2004)

The action came on for trial on the merits before the Court without a jury on March 30, 2004, all parties to the above-captioned case having agreed to a separate trial to the bench of all issues of fact concerning the ownership and boundaries of "the 27 Acre Tract" described below and made the basis of TH Investments, Inc.'s trespass to try title cause of action. All the parties and their attorneys were present and announced ready. On April 12, 2004 the evidence concluded, the parties rested, and the Court heard the argument of counsel.

After considering the pleadings, the evidence, the argument and briefs of counsel, the Court, in response to requests made by the parties for findings of fact and conclusions of law pursuant to Rule 296, TEXAS RULES OF CIVIL PROCEDURE, makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

A. Preliminary Findings

1. This action concerns a 27-acre tract (more or less) ("the 27 Acre Tract") first described in the deed of May 27, 1895 from Mary Jones to J.P. McGee, and thereafter described in the deed of February 15, 1896 from J.P. McGee to Emma Hudson.

2. The parties have stipulated that TH Investments, Inc. ("THI") holds record title to the 27-Acre Tract. THI acquired record title to the tract from the Carter Heirs.

3. The 27 Acre Tract lies in Harris County, east of the city of Houston, north of the confluence of the Houston Ship Channel and the San Jacinto River, south of interstate 10, and in the area of confluence of the San Jacinto River (to the east and south of the property) and Old River (to the north and west of the property).

4. According to the deeds, the 27 Acre Tract is located within the J.T. Harrell Survey, north of the South Line of the J.T. Harrell Survey, west of the Jones Hare line, and between these two survey lines is bounded by the "meanders of Old River" to the north and west. The J.T. Harrell Survey is a common law grant (as distinguished from a Spanish or Mexican grant).

5. The area of the 27-Acre Tract is submerged beneath the waters of Old River and the San Jacinto River, but on rare occasions becomes exposed during

the fall and winter months at times of a north wind and a low tide.

6. The water over, around and in the area of the 27-Acre Tract is subject to the ebb and flow of the tide, being within the tidewater limits of the Gulf of Mexico. The waters of Old River and the San Jacinto River likewise are tidally influenced in the area in question. The facts in the record demonstrate the area is tidally influenced. The parties likewise stipulated the area is tidally influenced.

7. The waters of Old River and the San Jacinto River are navigable, and average more than 30 feet in width from their mouths up.

8. The Port of Houston Authority of Harris County, Texas ("the Port Authority") owns land in the original Mary Neidermeier Survey, which abuts and is south of the land in the original J.T. Harrell Survey.

9. A barge fleeting area called "The Big Empty" is operated by Kirby Inland Marine, L.P. ("Kirby") to the north and east of and adjacent to the 27 Acre Submerged Tract. The area around the 27-Acre Tract is subject to significant commercial maritime use, as well as occasional use for recreational purposes by pleasure craft and for fishing.

10. THI's predecessors in interest, the Carter Heirs, leased the 27-Acre Tract to Kirby and Kirby's predecessors, which are engaged in the barge fleeting business. The first such lease was in 1978 to Western

Towing Company (THI Exhibit 95). The second such lease was in 1991 to Kirby (THI Exhibit 113). The 1991 lease contained the Carter Heirs acknowledgement that Kirby intended to improve the premises for fleeting purposes "and dredging of the Demised Premises, and permanent mooring of empty barges to act as a boundary support of the Demised Premises."

B. Submergence and Disappearance of the 27-Acre Tract

11. The physical evolution of the 27 Acre Tract over time was caused by various natural and man-made forces, including subsidence, erosion, deposition, accretion, flooding, tidal inundation, sea level rise, dredging, dredge spoil dumping, boat wakes, storm surges, and the location of sunken barges and barge fleeting in The Big Empty. The effects of all of these varied forces on the site cannot be separated, and the extent to which subsidence versus erosion contributed to the submergence cannot be determined.

12. Over a period of decades, the 27-Acre Tract became submerged below the line of mean high tide. This submergence occurred gradually and imperceptibly and caused the historic meander boundary of the 27-Acre Tract to slowly contract and eventually to disappear.

13. A 1916 topographical map (Common Exhibit 29) shows that the land at the location in question was generally in the shape of what the parties and

witnesses called a "Rabbit's Head." No such shape can now be identified at the location in question. The shape of the tract surveyed by THI's surveyor, Bill Merten, is called "Tract 1" and differs materially in shape from the historic "Rabbit's Head."

14. The boundary of the 27-Acre Tract described by the deeds as bounded by "the meanders of Old River" cannot now be identified or located.

15. At present, there exists at the location what the parties and witnesses have called a "Flat." This Flat is typically covered by tidal waters but is occasionally uncovered, as shown by many of the photographic exhibits. While there exists a drop off to the north of the Flat, the evidence shows that this was created by dredging. The Flat extends to the south beyond the boundaries claimed by THI for the 27-Acre Tract. The topography of the Flat is generally flat, with minor differences in elevation.

16. The 27 Acre Tract as claimed by THI cannot be distinguished from other areas of the Flat not claimed by THI, and cannot be distinguished from the bed of Old River. *See* Conclusion No. 46, *supra*.

17. The only existing meander lines between land and water that now exist at the location are the present meanders of Old River and the San Jacinto River around an Island, part of which is claimed by THI to lie within The 27 Acre Tract, and most of which is claimed by THI to lie within the northerly part of the Island, called "Tract 2" by THI.

18. Small portions of land above the line of mean high tide within the area claimed by THI as the 27 Acre Tract arose from submerged soil beneath the waters of Old River due to the deposit of dredged spoil, sunken barges, and accretion caused by the sunken barges and barge fleeting in and around The Big Empty. These small portions of land would not exist but for such activities, which were conducted by the lessees of the Carter Heirs, namely Western Towing and Kirby.

19. To date, there has been no attempt to reclaim The 27 Acre Tract from its submerged state.

C. Survey Lines

20. The J.T. Harrell line is correctly located by the survey of Nedra Foster (Kirby Exhibit 2), which is incorporated herein as if set out verbatim. This is the same line as that found by the surveys of J.S. Boyles that were patented by the Texas General Land Office in 1936 and 1951.

21. The J.T. Harrell Survey does not overlap the Mary Neidermeier Survey to the south.

22. The line of mean high tide around the Island is correctly located by the survey of Nedra Foster (Kirby Exhibit 2), which is incorporated herein as if set out verbatim.

23. The location of the Jones Hare line is undisputed by the parties, and is correctly located by the survey of Nedra Foster (Kirby Exhibit 2).

24. Bill Merten's location of the South Line of the J.T. Harrell Survey is incorrect, and his identification by "probing" by a submerged Old River "meander line" now said to exist below the line of mean high tide is not reliable. The combination of soil composition and probing technique made Mr. Merten's testimony unreliable. Accordingly, Mr. Merten's survey of the 27-Acre Tract (called "Tract 1" by THI) is not correct, other than Mr. Merten's location of the Jones Hare line as agreed by Merten and Foster.

CONCLUSIONS OF LAW

25. In this trespass to try title action, THI bears the burden of proving its title. *Bacon v. Jordan*, 763 S.W.2d 395, 396 (Tex. 1988) (burden of proof in trespass to try title action).

26. In order to recover land claimed in a trespass to try title action, it is necessary that the evidence definitely locate and distinguish the land. *Hancock v. Moore,* 137 S.W.2d 45, 50 (Tex. Civ App. – El Paso 1939), *aff'd*, 146 S.W.2d 369 (Tex. 1940).

27. The soil covered by the bays, inlets and arms of the Gulf of Mexico within tidewater limits belongs to the State of Texas and constitutes public property that is held in trust for the use and benefit of all of the people. *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943); *State v. Bradford*, 50 S.W.2d 1065, 1069 (Tex. 1932); *City of Galveston v. Mann*, 143 S.W.2d 1028, 1033 (Tex. 1940); TEX. NAT. RES. CODE § 11.012 (Vernon 2000).

28. As a result of the special public interest in submerged lands lying under tidal waters, title to such lands can only be transferred by an express grant of the Texas State Legislature. *See Landry v. Robison*, 219 S.W. 819, 820 (Tex. 1920); *Lorino*, 175 S.W.2d at 414. Accordingly, title to land submerged beneath tidal waters is presumed to lie in the State. *Lorino*, 175 S.W. 2d at 413-14; *see also City of Corpus Christi v. Davis*, 622 S.W.2d 640, 644 (Tex. App. – Austin 1981, writ ref'd n.r.e.).

29. Under the circumstances of this case, the terms "tidal waters" and "navigable waters" are synonymous because the tide determines whether waters are "navigable waters" for the purpose of determining State ownership of submerged lands. "Navigable waters" are defined broadly in Texas, and include waters within the tidewater limits of the Gulf of Mexico, in addition to streams that are navigable in law (as defined by statute), or streams that are navigable in fact. *Bradford*, 50 S.W.2d at 1069 ("navigable waters" includes "navigable streams, as defined by statute, lakes, bogs, inlets, and other areas within the tidewater limits within [the State's] borders"); *Lorino*, 175 S.W.2d at 413 ("The bays, inlets, and other waters along the Gulf Coast which are subject to the ebb and flow of the tide of the Gulf of Mexico are defined as 'navigable waters'"); THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 3-3 (4TH ED. 2004) ("As a property law concept, navigable waters is used as the legal test of State or public ownership of submerged lands . . . ").

30. The waters of Old River and the San Jacinto River are navigable in law. *See Bradford*, 50 S.W.2d at 1069 ("navigable waters" include "navigable streams, as defined by statute, lakes, bogs, inlets, and other areas within the tidewater within the State's borders"). This is so both because the waters are tidally influenced, *Lorino*, 175 S.W.2d at 413, and because the Rivers average more than 30 feet in width from their mouths up. TEX. NAT. RES. CODE § 21.001(3) (Vernon, 2003).

31. The boundary between the State owned lands lying under tidal waters and private upland is the line of mean high tide for common law grants under the rule of *Rudder v. Ponder*, 293 S.W.2d 736, 741 (Tex. 1956), and mean higher tide for shore abutting Spanish or Mexican grants under the rule of *Luttes v. State*, 324 S.W.2d 167, 174 (Tex. 1958). Since the lands at issue devolved from a common law grant, the boundary line in this case is controlled by the line of mean high tide.

32. The line of high tide moves over time. As that line shifts, the boundary between State-owned submerged lands and privately owned uplands moves. *Coastal Industrial Water Authority v. York*, 532 S.W.2d 949, 952 (Tex. 1976) ("the general rule is that a riparian or littoral owner acquires or loses title to the land gradually or imperceptibly added or taken to or from his fast bank or shore"); *City of Port Isabel v. Missouri Pacific Railroad Co.*, 729 S.W.2d 939, 942 (Tex. App. – Corpus Christi 1987, writ ref'd n.r.e.) ("the location of the shoreline, wherever it may be at

any given time, represents the boundary of a littoral owner's property. [citations omitted] If over the years, the Laguna Madre has eroded the shoreline of Port Isabel, the newly submerged lands became the property of the State or its successor in title"). The same rule applies to non-tidal waters. *Brainard v. State*, 12 S.W.3d 6, 16 (Tex. 1999) ("Texas follows the general rule that when the location of the margin or bed of a body of water that constitutes the boundary of a tract of land is gradually and imperceptibly changed or shifted by accretion, reliction, or erosion, the margin or bed of the body of water, as so changed, remains the boundary line of the tract, which is extended or restricted accordingly").

33. The Port Authority is a political subdivision of the State of Texas, and when created was named the "Harris County Houston Ship Channel Navigation District." Act of June 6, 1927, 40th Leg., 1st C.S., ch. 97, 1927 Tex. Gen. Laws 256, 257 (creating and ratifying the Harris County Houston Ship Channel Navigation District); Act of March 24, 1971, 62nd Leg., R.S., ch. 42, 1971 TEX. GEN. LAWS 79 (changing the name of the navigation district to the Port of Houston Authority of Harris County, Texas).

34. In 1927 the Texas Legislature conveyed certain submerged lands in Harris County, Texas to the Port Authority. *See* Act of April 5, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 438 (granting certain submerged lands, islands and tidal flats to the Harris County Houston Ship Channel Navigation District); TEX. WATER CODE ANN. § 61.151(a) (Vernon

1988). The conveyance accomplished by this Act included "all the submerged lands lying and being situated under the waters of . . . San Jacinto River . . . [and] . . . Old River . . . so far up said streams as the State may own same, together with all lands lying and being situated under the waters of Old River . . . and all other tidal flats or overflow land adjacent to or appurtenant to the above mentioned streams . . . as now or hereafter located. . . ." Section 1 at 438. Under this description, the Act of April 5, 1927 encompasses the area of the 27-Acre Tract inasmuch as that tract now lies below the line of mean high tide.

35. The Act of April 5, 1927 provides, as pertinent to this action, (1) that lands that became submerged subsequent to the Act of Legislature would pass to the Port Authority, as reflected by the references in the statute to "tidal flats or overflow land . . . as now or hereafter located" (Section 1 at 438); (2) that the Port Authority would administer such lands "for public purposes and the development of commerce only" (*id.*); (3) that the port Authority shall not at any time "give or alien said lands or any part thereof" (Section 2 at 439); and, (4) that the Port Authority is empowered to "abate and remove any and all encroachments or structures of any kind now or hereafter existing on such property. . . ." (Section 3 at 439).

36. The meander description in the deeds describing the 27-Acre Tract refers to the line at which the water touches the land. *Brainard v. State*, 12 S.W.3d at 16 (not a case involving tidal waters, but

holding that the line between public and private ownership along banks of a navigable stream is the "gradient boundary," referring to the "water washed" line "which separates the bed from adjacent upland"); *Stover v. Gilbert*, 247 S.W. 841 (Tex. 1923) (a call to a meander line is a call to a natural boundary, such as the course of a stream, which is itself the real boundary); *Ely v. Briley*, 959 S.W.2d 723 n.1 (Tex. App. – Austin 1998, no writ) (following *Stover*); LANGE & LEOPOLD, Land Titles & Title Examination 2d, 4 TEXAS PRACTICE SERIES § 830 at 418-19 (quoting *Stover*).

37. As the 27 Acre Tract gradually became submerged beneath the line of mean high tide, and the meanders of Old River thus defined an ever-smaller upland tract, private parties lost ownership to the tract.

38. As the 27 Acre Tract became submerged below the line of mean high tide, ownership of the property beneath the line of mean high tide passed to the Port Authority pursuant to Texas law and the provisions of the Act of April 5, 1927. Thus the Port Authority, as successor in interest to the State of Texas owns all submerged lands below the line of mean high tide at the location in question and within the area described as the 27-Acre Tract.

39. The question of title to the 27-Acre Tract is an issue affecting the public interest in the use and enjoyment of tidally influenced, navigable waters. The Port Authority is charged with advancing the

public interest and promoting maritime commerce, justifying its ownership of submerged lands, and it is consistent with the interests of all to permit the Port Authority to own the property pursuant to the terms stated by the Texas Legislature. *See Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 58 (Tex. Civ. App. – Corpus Christi 1993, writ denied).

40. *Coastal Industrial Water Authority v. York*, 532 S.W.2d 949 (Tex. 1976), does not control the outcome of this action under the facts established at trial. First, *York* did not result in a private property owner obtaining fee simple title to submerged lands, as is claimed by THI. Second, *York* does not apply to cases where, as here, the submerged land at issue lies under tidal waters. *See York*, 532 S.W.2d at 951 n.1; *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643 (Tex. App. – Austin 1981, writ ref'd n.r.e.) ("The [*York*] opinion was specifically limited to non-tidal waters. In a footnote in *York*, supra at 951-52, Justice Reavley emphasized the narrowness of the holding and cautioned against misinterpretation of its effect upon lands within reach of the tide").

41. Even if the submerged land at issue did not lie under tidal water and THI were not seeking fee simple title, other factual and legal elements found in *York* are not present in this case.

42. While an upland owner generally takes title to accretions onto his upland, a private party may not acquire title to State owned submerged land below the line mean high tide by "accretion" to the

submerged land. "Accretion is the process of the gradual enlargement of the fast land." *York*, 532 S.W.2d at 952. Thus, an upland owner must prove "true accretion" to "the original boundary of the grant." *Luttes v. State*, 324 S.W.2d 167, 187 (Tex. 1958). Therefore, ownership of accretions to submerged land rests in the State. *Lakefront Trust, Inc. v. City of Port Arthur*, 505 S.W.2d 606, 608 (Tex. Civ. App. – Beaumont 1975, writ ref'd n.r.e.) (holding that the State owned a newly formed island which accreted onto and emerged from submerged land). Pursuant to the Act of April 5, 1927, the Port Authority succeeds to the State's interest in lands that emerge from submerged land within the scope of the Act.

43. A private party also may not acquire title through self-help that raises land from submerged land lying under tidal waters. *York*, 532 S.W.2d at 952 (one "may not acquire title to submerged land through self-help by filling and raising the land level"); *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 414 (Tex. 1943) ("The evidence shows that the process of changing the submerged land into uncovered or dry land was caused by the acts of Stapp [the original owner] and his successors by the use of artificial means, and was not the result of the process of gradual additions caused by the natural flow of the tide washing sand upon the shore. . . . For this reason the accreted land belong to the State. . . ."); *Natland Corp. v. Baker's Port Inc.*, 865 S.W.2d 52, 58 (Tex. App. – Corpus Christi 1993, writ denied) ("We believe

that the principles followed in the out-of-state authorities and suggested in *York*, *Baxter*, and *Davis* apply to vest title to artificially-induced accretions in the upland owner, when that owner has not caused or directly participated in the artificial accretions"). The rule against self-help applies to non-tidal waters as well. *Brainard v. State*, 12 S.W.3d 6, 19 (Tex. 1999) ("A widely recognized exception to the general rule is that accretion does not belong to the owner of the land adjoining the water when the owner causes the accretion").

44. The actions of the lessees of the Carter Heirs' in causing the emergence of land from submerged soil beneath the line of mean high tide is attributable in law to the successors in interest of the Carter Heirs and constitutes "self help." *Lorino*, 175 S.W.2d at 414. Accordingly, the Port Authority, and not THI, is the owner of those small portions of land above the line of mean high tide within the area claimed by THI as the 27-Acre Tract.

45. The location of the South Line of the J.T. Harrell Survey and the Jones Hare line is material to the boundary between what THI terms "Tract 2" (the northerly part of the Island) and the lands owned by the Port Authority to the south of the 27 Acre Tract in the Mary Neidermeier Survey.

46. The bed of Old River is the soil beneath the line mean high tide. *See State v. Bradford*, 50 S.W.3d 1065, 1069 (Tex. 1932), *quoting Motl v. Boyd*, 286 S.W. 458, 467 (Tex. 1926) ("The bed of a stream is that

portion of its soil which is alternatively covered and left bare as there may be an increase and diminution in the supply of water. . . .").

47. THI has failed to meet its burden of proof and, therefore, is not the owner of the 27-Acre Tract.

48. THI possesses no estoppel claim against the Port Authority, as reflected by this Court's summary judgment ruling reflected by its Order Granting the Port of Houston Authority's Motion for Summary Judgment on the Issues of Estoppel, signed on December 22, 2003.

49. Neither title to nor ownership of mineral rights are at issue in this matter. These Findings and Conclusions do not affect the rights of third parties, more particularly the Carter Heirs rights to mineral ownership.

50. If any finding of fact should be characterized as a conclusion of law, or if any conclusion of law should be characterized as a finding of fact, the Court recharacterizes it here accordingly.

Signed on this ___ day of APR 22, 2004, 2004.

/s/ John T. Wooldridge
HON. JOHN T. WOOLDRIDGE,
JUDGE PRESIDING

THE SUPREME COURT OF TEXAS

Orders Pronounced May 30, 2008

* * *

ORDERS ON MOTIONS FOR REHEARING

THE MOTIONS FOR REHEARING
OF THE FOLLOWING PETITIONS
FOR REVIEW ARE DENIED:

07-0111 T H INVESTMENTS, INC. v. KIRBY INLAND MARINE, L.P. AND PORT OF HOUSTON AUTHORITY OF HARRIS COUNTY, TEXAS; from Harris County; 14th district (14-05-00204-CV, 218 SW3d 173, 02-01-07)

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

U.S. CONSTITUTION, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. CONSTITUTION, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several states according to their respective

numbers, counting the whole number of persons in each state, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the executive and judicial officers of a state, or the members of the legislature thereof, is denied to any of the male inhabitants of such state, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such state.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any state, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any state legislature, or as an executive or judicial officer of any state, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor

any state shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

TEXAS STATUTES

Act of April 5, 1927

GRANTING CERTAIN ISLANDS AND LANDS TO HARRIS COUNTY SHIP CHANNEL NAVIGATION DISTRICT

S.B. No. 222:] CHAPTER 292.

An Act granting to the Harris County Ship Channel Navigation District of Harris County, Texas, or its successors, and defining such successors, all right, title and interest of the State of Texas, to certain islands and lands subject to overflow, and lands lying under the waters of Peggy's Lake, San Jacinto Bay, Burnett Bay, Crystal Lake, Scott's Bay, Black Duck Bay, The San Jacinto River and Buffalo Bayou and tributary waterways, within Harris County Navigation District as far as the State may own same, for public purposes and for the development of commerce only, and granting to the navigation district and its successors the right, power and authority to authorize, establish, construct, purchase, own, maintain,

equip, regulate, operate and lease wharves, piers, docks, dry docks, marine ways and other aids to navigation, and to construct or grant franchise for the construction of such wharves, piers, docks or lands so filled in, or elevators, warehouses, bunkers, railway terminals, sidetracks or other aids to navigation or commerce; reserving to the State of Texas the aids to navigation or commerce; reserving to the State of Texas the right at any time to place the operation of said facilities under the supervision of the Railroad Commission of Texas, and to provide reasonable wharfage and storage charges thereon; authorizing the navigation district to remove and abate any encroachment or structure on said property, and to bring such suit, or suits, as may be necessary to carry out the provisions of this Act; reserving all mineral, sand, shell, and marl rights in said lands to the State; reserving to the State of Texas the right to erect wharves, piers and buildings on said lands, authorizing navigation district to grant rights-of-way or easements for channels, etc., to the United States Government, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That all right, title and interest of the State of Texas, to all lands hereinafter in this section described, to wit:

All islands and lands owned by the State of Texas, many of which are subject to overflow, known as Barnes Island, Alexander Island, Goat Island, Diamond Island and Hog Island in San Jacinto River

above Lunchburg, and certain accretions formed by dredged material excavated from the channel and forming land attached to or near said Alexander Island, Hog Island between Goose Creek and Morgan Point, Atkinson Island, and all the submerged lands lying and being situated under the waters of Buffalo Bayou, San Jacinto River, White Oak Bayou, Bray's Bayou, Simms Bayou, Vinces Bayou, Hunting Bayou, Greens Bayou, Carpenters Bayou, Old River, Lost River, Goose Creek and Cedar Bayou, and all other streams within Harris County Navigation District tributary to the Houston Ship Channel, so far up said streams as the State may own same, together with all lands lying and being situated under the waters of Old River, Burnett's Bay, Crystal Lake, Scott's Bay, Peggy's Lake, Black Duck Bay, Tabbs Bay and San Jacinto Bay, and all other tidal flats or overflow land adjacent to or appurtenant to the above mentioned streams within the limits above mentioned except Mitchell's Bay and any area between said bay and the Houston Ship Channel, as now or hereafter located, is hereby granted to the Harris County Houston Ship Channel Navigation District, or its successors, for public purposes and for the development of commerce only, in accordance with the following provisions and stipulations herein contained; provided that inasmuch as it is the purpose of this Act to grant said lands to the public agency which is developing the Port of Houston, upon the creation by legislation of other public agency which shall supercede the said navigation district as the public agency developing the Port of Houston, the title to said lands shall be

transferred from the navigation district to such public agency, either municipal or State, so provided, such public agency being referred to herein as the successors of the navigation district.

SEC. 2. The navigation district, or its successors, is hereby granted the right, power and authority to authorize, establish, construct, purchase, own, maintain, equip, regulate, operate and lease wharves, piers, docks, dry docks, marine ways and all other structures and appliances for facilitating or accommodating commerce or navigation, and to dredge out channels, slips and turning basins, and to fill in space between the main land and islands and to fill areas for wharves, piers, docks, dry docks, marine ways and all other structures and appliances for facilitating or accommodating commerce or navigation, having first secured a permit from the Government of the United States of America therefor, and to construct, or cause or authorize to be constructed on said wharves, piers, docks, dry docks, marine ways and all other structures and appliances for facilitating or accommodating commerce or navigation, or on lands so filled in, any and all elevators, warehouses, bunkers, railway terminals and sidetracks, or any other facilities or aids whatsoever to navigation or commerce. Said lands shall be used by the navigation district, or its successors, solely for the establishment, improvement and conduct of an harbor and for the construction, maintenance and operation thereon of any facilities or aids whatsoever to the same, and said navigation district, or its successors, shall not at any time grant,

convey, give or alien such lands or any part thereof, to any individual, firm or corporation for any purpose whatsoever; provided, that said navigation district, or its successors, may grant franchises thereon for limited periods of time for wharves, and other public uses and purposes, and may lease said lands or any part thereof for limited periods for purposes consistent with this Act, but no wharves, piers or structures of any kind shall be constructed on said lands by anyone save the navigation district, except under a franchise granted by said navigation district and in a manner first prescribed by and approved of by said navigation district or its successors.

SEC. 3. For the purpose of carrying out the provisions of this Act, the navigation district, or its successors, is hereby granted the right, power and authority to abate and remove any and all encroachments or structures of any kind now or hereafter existing on said property, save such as may have been constructed under permit from the United States War Department, or other proper Federal authority, and shall have the right to bring such suit or suits as may be necessary to carry out the provisions of this Act to the same extent and as fully and completely as the right to bring such a suit or suits existed in the State prior to the passage hereof.

SEC. 4. The purposes and provisions of the Act, and the grants, rights and privileges, thereunder to Harris County Houston Ship Channel Navigation District, shall not affect, curtail or abridge the rights of riparian owners of lands abutting upon the islands

and lands subject to overflow, and lands lying under the streams, bays and lakes herein described or referred to, as the same existed under the Common Law or the Constitution or Statutes of Texas at the time this Act shall become in force and effect, or to deprive riparian land owners of access to such streams, channels or waters.

SEC. 5. The State of Texas, may at any time, place the operation of said facilities under the supervision of the Railroad Commission of Texas, to insure reasonable wharfage and storage charges.

SEC. 6. The right is hereby expressly reserved by the State of Texas to erect on the lands herein conveyed such wharves, piers and buildings for State purposes as may hereafter be authorized by law.

SEC. 7. All mines and mineral rights, including oil and gas in and under said lands, together with the right to enter there on for the purpose of development, and the granting of permits to excavate sand, shell or marl and to collect the tax on same, are hereby expressly reserved to the State of Texas; provided necessary or proper access to the lands hereby ceded, together with all improvements heretofore made, or to be made, under any mineral leases issued by the State in connection with mineral rights herein reserved are made a condition of this grant, and are covenants running with the ceded lands; provided further, that leases hereafter made by the State, or operations thereunder in connection with reserved mineral rights shall not interfere with the

improvements made, or to be made in the development of the ship channel by the said navigation district, or franchise holders thereunder.

SEC. 8. Nothing in this Act shall prohibit the Navigation District or its successors from granting to the United States of America such rights-of-way or easements as may be required by it for the construction of channels, basins, dumping grounds, or other allied purposes in connection with any work voluntarily undertaken by the Federal Government, or at the request of the navigation district or its successors.

SEC. 9. The large amount of business to be done at the present Session of the Legislature, and the urgent need of clearing the calendar of pending legislation as rapidly as possible, and the fact that the Congress of the United States has authorized a view of securing an increased width and depth, which will materially affect the development of the above lands, creates an emergency and an imperative public necessity that the constitutional rule requiring bills to be read on three several days be suspended, and this Act shall be in force and effect from its passage, and it is so enacted.

TEXAS NATURAL RESOURCES CODE:

§ 11.012 Gulfward Boundary of Texas

(a) The gulfward boundary of the State of Texas is the boundary determined in and pursuant to the

decision of the United States Supreme Court in Texas v. Louisiana, 426 U.S. 465 (1976).

(b) The State of Texas has full sovereignty over the water, the beds and shores, and the arms of the Gulf of Mexico within its boundaries as provided in Subsection (a) of this section, subject only to the right of the United States to regulate foreign and interstate commerce under Article I, Section 8 of the United States Constitution, and the power of the United States over admiralty and maritime jurisdiction under Article III, Section 2 of the United States Constitution.

(c) The State of Texas owns the water and the beds and shores of the Gulf of Mexico and the arms of the Gulf of Mexico within the boundaries provided in this section, including all land which is covered by the Gulf of Mexico and the arms of the Gulf of Mexico either at low tide or high tide.

(d) None of the provisions of this section may be construed to relinquish any dominion, sovereignty, territory, property, or rights of the State of Texas previously held by the state.

TEXAS WATER CODE

§ 61.115 Acquisition of Property

The commission may acquire by gift, grant, purchase, or condemnation any necessary rights-of-way and

property for necessary improvements contemplated by the district.

---

§ 61.161 Eminent Domain

(a) The district may exercise the power of eminent domain.

(b) A district created under this chapter may elect to take advantage of the condemnation procedure provided in Subchapter F of Chapter 51 of this code.

---

§ 62.106 Condemnation Proceedings

(a) The district may exercise the power of eminent domain to condemn and acquire the right-of-way over and through any and all public and private land necessary:

(1) for the improvement of any river, bay, creek, or stream;

(2) for the construction and maintenance of any canal or waterway; and

(3) for any and all purposes authorized by this chapter.

(b) Condemnation proceedings instituted under Subsection (a) of this section shall be instituted under the direction of the commission and in the name of the district. The assessment of damages shall be in conformity with the laws of the State of Texas for

condemnation and acquisition of rights-of-way by railroads.

(c) No appeal from the finding and assessment of damages by the commissioners shall have the effect of causing a suspension of work by the commission in prosecuting the work of improvement in all of its details.

(d) No right-of-way may be condemned through any part of an incorporated city or town without the consent of the lawful authorities of that city or town.

(e) A district created under this chapter may elect to take advantage of the condemnation procedure provided in Subchapter F of Chapter 51 of this code.

---

§ 62.107 Acquisition of Land

(a) Any district created under this chapter may acquire by gift, purchase, or condemnation and may own land adjacent or accessible to the navigable water and ports developed by it which may be necessary or required for any and all purposes incident to or necessary for the development and operation of the navigable water or ports within the district, or may be necessary or required for or in aid of the development of industries on the land.

(b) The district may lease any part of the acquired land to any individual or corporation and may charge for the lease reasonable tolls, rents, fees, or

other charges. The district may use the proceeds both for the maintenance and operation of the business of the district and for the purpose of making the district self-supporting and financially solvent and returning the construction costs of the improvements within a reasonable period.

(c) The acquisition of land for the purposes included in this section and the operation and industrial development of ports and waterways are a public purpose and a matter of public necessity.

EXHIBIT B

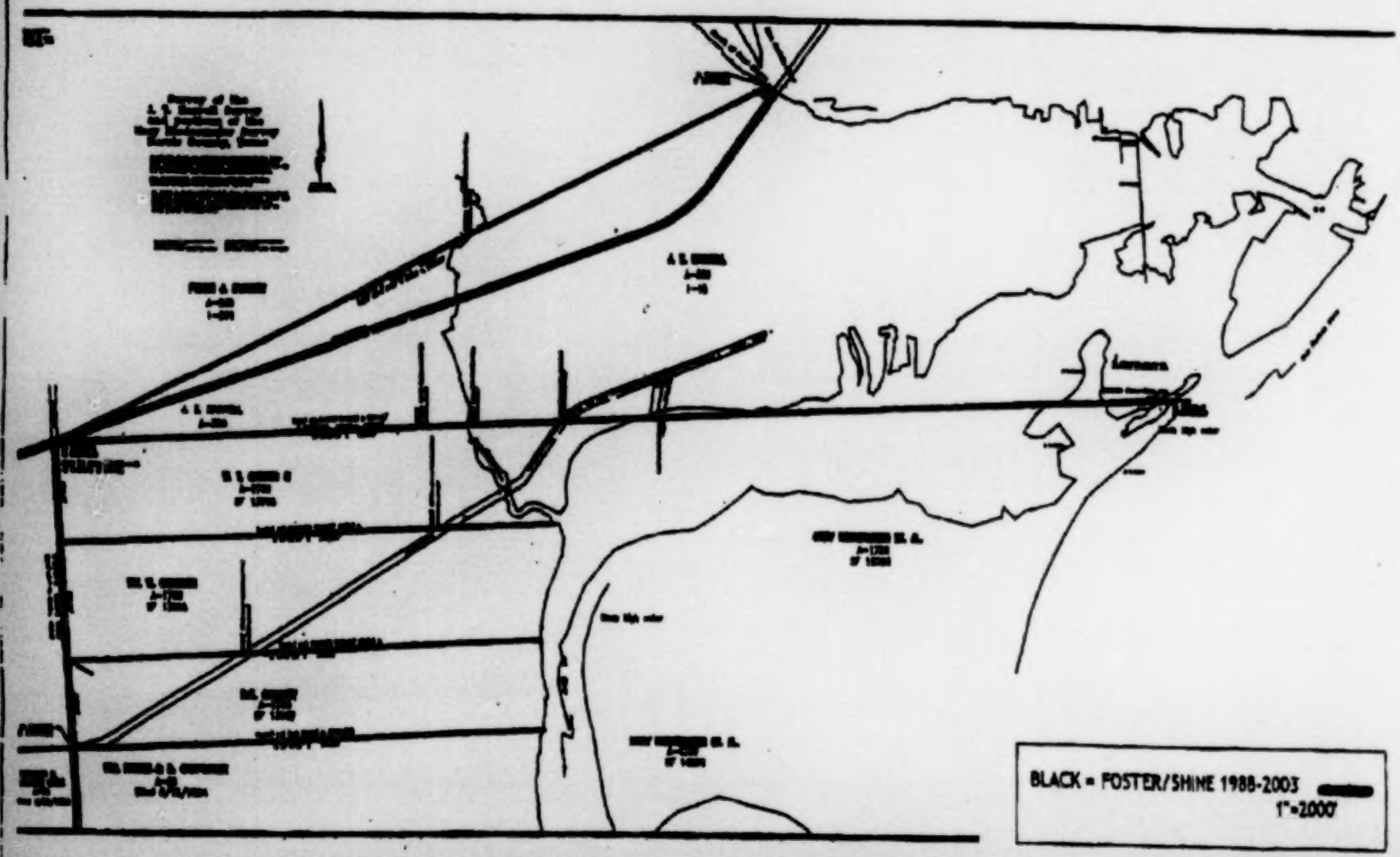

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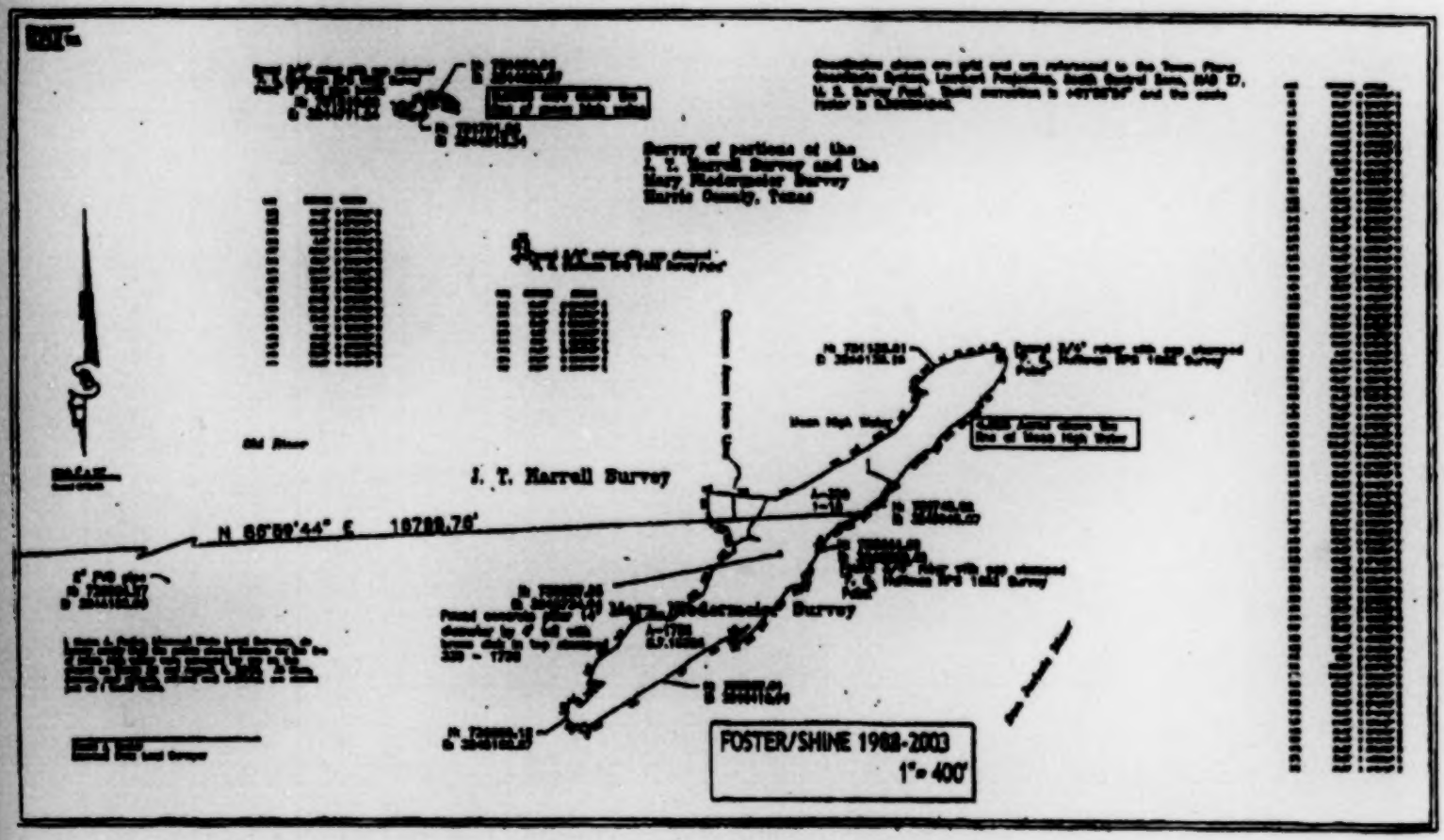
EXHIBIT B


Survey of portions of the
J. T. Harrell Survey and the
Mary Hodgenpeter Survey
Harris County, Texas
J. T. Harrell Survey
N 88°59'44" E 10788.76'
Mary Hodgenpeter Survey
FOSTER/SHINE 1988-2003
1" = 400'

Supreme Court, U.S.
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No. 08-270

In The
Supreme Court of the United States

T H INVESTMENTS, INC.,

Petitioner,

vs.

KIRBY INLAND MARINE, L.P.,
AND PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,

Respondents.

On Petition For A Writ Of Certiorari To The Court Of Appeals for the Fourteenth District of Texas

KIRBY INLAND MARINE, L.P.'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

T H Investments, Inc.'s ("THI") Petition should be denied because, even if this Court needed to address when a court may constitutionally declare that private ownership of property is lost without compensation, the facts of this case make it inappropriate for review.

This case involves submerged tidelands near the Texas Gulf Coast – land that is below the line of mean high tide, beneath navigable waters that are subject to the ebb and flow of the tide. Under longstanding common law principles that apply in most coastal states, including Texas – principles this Court has repeatedly recognized – the State owns all such tidelands. THI does not challenge this rule, and no authority has ever held it is unconstitutional.

Furthermore, the land at issue in this case became submerged long before THI acquired record title to it in 2002. It therefore belonged to the State of Texas before the seller conveyed it (by non-warranty deed) to THI, and THI never owned it in the first place. THI therefore has no constitutionally protected property interest and is not entitled to compensation under the Takings Clause or the Due Process Clause.

Finally, the manner in which the land in this case is described in the deed records makes it impossible to identify because the boundaries no longer exist. The boundary line of this property is the meander line of a river whose waters now cover it and have washed it to the point that it is indistinguishable

from the riverbed. Thus, even if it were theoretically possible for THI to have title to this submerged property, the boundary line is gone and THI has nothing for which it is entitled to compensation.

This case simply does not present any significant takings or due process issue for this Court to resolve. The Texas state courts applied longstanding common law principles, and THI never had a valid ownership interest in the property at issue. Therefore, the Petition should be denied.

COUNTER-STATEMENT OF THE CASE

THI's Statement of the Case is incomplete and misleading. Contrary to THI's statements, the Texas state courts did not "confiscate" or "extinguish" any property rights of THI. Rather, they held that THI could not prove its speculative claim of title to a parcel of submerged tidelands near the Texas Gulf Coast (the "Property") because title to that Property, under settled law, was held by the State of Texas.

THI's record title to the Property derives from a land patent from the Republic of Texas to Josiah T. Harrell in 1845, prior to Texas statehood. (Pet. App. 19, 53) The Property is a small tract of land along the southern boundary of the original Harrell patent that was once dry land, generally in the shape of a rabbit's head, abutting waters that flow directly into the Gulf of Mexico.

THI's petition describes the Property as consisting of 27 acres of dry land, but that is merely a historical approximation. (Pet. App. 2-3) The actual size and shape of the Property was subject to constant change because it was bounded by the "meanders of Old River." (Pet. App. 89)

When THI acquired record title to the Property in 2002, the Property was almost entirely submerged below the line of mean high tide, beneath navigable waters that are subject to the ebb and flow of the tide. (Pet. App. 91) It is now a featureless "flat" that is indistinguishable from the bed of Old River. (Pet. App. 92) To the extent that any part of the Property is not submerged at high tide, it is only because of the deposit of dredged spoil, sunken barges, and accretion caused by sunken barges and barge fleeting in the area. (Pet. App. 93)

Contrary to THI's contentions, Kirby Inland Marine, L.P. ("Kirby") did not use any portion of the Property for its business. Rather, the lower courts found, and THI does not dispute here, that Kirby only used an adjacent area, referred to as the "Big Empty," for its barge mooring and fleeting business. (Pet. App. 90) Although it is true that before THI acquired record title, Kirby and its predecessors leased the Property from the prior record owners (the "Carter Heirs"), Kirby only did so for a nominal amount to eliminate any doubt as to Kirby's right to use the adjacent waters, not because the Carter Heirs truly owned the Property and riparian rights associated with it. Indeed, when the Carter Heirs sold their

interest in the Property to THI in 2002, they refused to guarantee title, providing only a non-warranty deed. (Pet. App. 3) The Carter Heirs' spokesperson, Haliy Bryan Clements, testified that she thought the principals of THI must have "lost their minds" to pay good money for it. (6 RR 138-39)

THI never actually used the Property or had good reason to believe it had good title to the Property. Shortly after acquiring record title, THI demanded that Kirby increase its lease payments by 3,400 percent (from $1,000 to $35,000 per month), and threatened to evict Kirby. (Pet. 7; Pet. App. 5) That precipitated this lawsuit, which THI lost, so THI really used the Property only for this litigation. (*Id.*) Moreover, THI knew the dubious nature of its title because THI's agreement to acquire the Property from the Carter Heirs included a "Coastal Area Property" addendum that expressly warned THI that "[t]he real property described in and subject to this contract adjoins and shares a common boundary with the tidally influenced submerged lands of the state," and that THI "may gain or lose portions of the tract because of changes in the boundary." (Pet. App. 4)

The lower courts found this is precisely what happened, to the point that the entire tract consisted of "tidally influenced submerged lands of the state." The trial court specifically found that the Property is "submerged beneath the waters of Old River and the San Jacinto River" (Pet. App. 89); that it is "below the line of mean high tide" (Pet. App. 91); that its submergence "occurred gradually and imperceptibly and

caused the historic meander boundary of the [Property] to slowly contract and eventually to disappear" (*id.*); that the Property's boundary line "cannot now be identified or located" (Pet. App. 92); and that the water covering the Property is "navigable" and "subject to the ebb and flow of the tide." (Pet. App. 89-92) The court therefore applied the long-established public trust doctrine, recognized in Texas, and concluded that title to the property was in the State of Texas, not THI. (Pet. App. 94-96) And because the State of Texas had assigned its interest in submerged lands in the area to the predecessor of the Port of Houston Authority of Harris County, Texas (the "Port of Houston") by legislative act in 1927, the Property belonged to the Port of Houston, not to THI. (Pet. App. 97-99) The court of appeals upheld all of these findings, most of which THI did not challenge. (Pet. App. 9-16)

REASONS FOR DENYING THE WRIT

THI asks this Court to grant a writ of certiorari to decide whether the Texas state courts, by adjudicating that THI does not own the Property, effectively deprived THI of its property rights in violation of the Takings Clause and Due Process Clause of the U.S. Constitution. (Pet. 12-13) The threshold question in any such claim is whether the claimant has a constitutionally protected property interest. *Kentucky Dept. of Corrections v. Thompson*, 490 U.S. 454, 460 (1989); *Board of Regents of State Colleges v. Roth*, 408 U.S.

564, 577 (1972). This requires THI to establish a legitimate claim of entitlement to the Property. *Id.* THI cannot make this showing.

I. THI Has No Property Interest in Submerged Tidelands.

The lower courts found, and it is undisputed, that the Property is submerged beneath navigable waters that are subject to the ebb and flow of the tide (referred to herein as "tidelands"). (Pet. App. 89-90) Under long-settled Texas law, and common law principles long recognized by this Court, the State owns all such tidelands. *See Lorino v. Crawford Packing Co.*, 175 S.W.2d 410, 413 (Tex. 1943) ("The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State"); *Phillips Petroleum Co. v. Mississippi*, 484 U.S. 469, 473-74 (1988) (recognizing "the settled rule of law in this court that absolute priority in, and dominion and sovereignty over, the soils under the tide waters . . . were reserved to the several States," including the original states and those, like Texas, that were admitted later). It has "been long established that the individual States have the authority to define the limits of the lands held in public trust and to recognize private rights in such lands as they see fit." *Phillips Petroleum*, 484 U.S. at 475.

The only part of the Property that is not submerged arose from submerged soil by the deposit of

dredged spoil and accretion caused by sunken barges, (Pet. App. 93), and Texas law holds that title remains with the State when it is raised through such "self-help." *See Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949, 952 (Tex. 1976) (holding that one "may not acquire title to submerged land through self-help by filling and raising the land level"); *Lakefront Trust, Inc. v. City of Port Arthur*, 505 S.W.2d 606, 608 (Tex. Civ. App. – Beaumont 1975, writ ref'd n.r.e.) (holding that land that emerged through accretion belongs to the State).

THI does not claim, nor could it claim, the State ever intended to grant it or its predecessors title to any submerged tidelands. The original land patent from the Republic of Texas, dated March 18, 1845, evidences no intent to convey submerged lands, and even if it did, title was later granted to the State of Texas when it was admitted to the Union on December 29, 1845. *See Phillips Petroleum*, 484 U.S. at 477 (holding that "the States, upon entry into the Union, received ownership of all lands under waters subject to the ebb and flow of the tide," and affirming the lower court's holding that title to certain tidelands was in the State of Mississippi in spite of a prior Spanish land grant to a private owner). Moreover, under Texas law, title to submerged tidelands cannot be transferred into private ownership without an Act of the Legislature, and there was no such legislative act here. *State v. Balli*, 190 S.W.2d 71, 113-14 (Tex. 1944); *Lorino*, 175 S.W.2d at 414. Thus, THI's record title to the Property does not give it a legitimate

claim of entitlement to the Property because the land is submerged beneath waters subject to the ebb and flow of the tide.

II. THI Has No Property Interest In Formerly Dry Land That Became Submerged Tidelands.

Texas law is also well settled that coastal property boundaries automatically recede, with no right to compensation, when the water line encroaches. *See Balli*, 190 S.W.2d at 100 (holding that when the sea encroaches on an upland owner's property, ownership is lost with "no redress"); *City of Port Isabel v. Missouri Pac. R.R. Co.*, 729 S.W.2d 939, 942 (Tex. App. – Corpus Christi 1987, writ ref'd n.r.e.) (stating that "the location of the shoreline, wherever it may be at any given time, represents the boundary of a littoral owner's property."); *Matcha v. Mattox*, 711 S.W.2d 95, 99 (Tex. App. – Austin 1986, writ ref'd n.r.e.) (stating that the boundary line between private beachfront property and the state's submerged property line is the line of mean high tide, and it changes with the location of the water line), *cert. denied*, 481 U.S. 1024 (1987); *City of Corpus Christi v. Davis*, 622 S.W.2d 640, 643 (Tex. App. – Austin 1981, writ ref'd n.r.e.) (stating that the line of mean high tide is the boundary line, and if the sea encroaches, the upland owner loses his land and has "no redress"). Thus, THI's record title also does not give it a legitimate claim of entitlement to the Property merely because the land used to be above the line of mean high tide.

III. THI's Argument Misconstrues *York*.

THI's contention that it owns the Property, even though it is now submerged tidelands, is based on a misinterpretation of the Texas Supreme Court's decision in *Coastal Industrial Water Authority v. York*, which found that a Texas property owner retained title to property that became submerged due to subsidence. 532 S.W.2d at 954. THI makes much of the fact that the property involved in *York* is close in proximity to where the Property is located, but THI ignores the language in *York* explaining that its holding is limited to the peculiar facts developed in the record of that case. *See id.* at 951 & n.1.

The *York* opinion spends two paragraphs explaining that although the property at issue is located in the Houston Ship Channel, where one would expect the ebb and flow of the tide to wash it to the point where it was indistinct from the bed of the Ship Channel – in which case private "ownership would have been lost" – the testimony developed in that case was that the water did *not* fluctuate with the ebb and flow of the tide. *Id.* at 951-52 & n.1. Moreover, the parties in *York* assumed there had been no displacement of the submerged land in relation to the bed of the Ship Channel, and that there was no difficulty in identifying the boundaries of the tract. *Id.* at 952. Because of these peculiarities, the Texas Supreme Court emphasized that its opinion was "restricted to the issues presented by the peculiar facts of this record and the contentions of these parties." *Id.* at 951 n.1.

Unlike the evidence in *York*, the evidence here led the trial court to find that the Property is submerged beneath navigable waters that are subject to the ebb and flow of the tide (Pet. App. 89-90); that the Property became submerged gradually and imperceptibly over time due to a variety of natural and man-made forces, the effects of each of which cannot be separated (Pet. App. 91); that the Property's boundary line, described as the "meanders of Old River," can no longer be identified or located (Pet. App. 91-92); and that the Property is now a featureless "flat" that cannot be distinguished from the State's riverbed. (Pet. App. 92) These facts establish that the State owns the Property, not THI. *See Phillips Petroleum*, 484 U.S. at 474 n.3 (recognizing "many" state court decisions holding that "tidal flats" and "salt marshes" are state owned); *Lorino*, 175 S.W.2d at 413 (stating that the soil under tidewaters belongs to the State).

This Court generally accepts the factual findings of a state court absent "exceptional circumstances." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 111 (1980); *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). No exceptional circumstances exist here to disregard the state court's factual findings, and based on those facts, the *York* opinion clearly does not provide THI a legitimate claim of entitlement to the submerged Property. Therefore, THI has no constitutionally protected property interest and no claim under the Takings Clause or the Due Process Clause.

IV. The Property No Longer Exists.

Finally, even if this Court were to conclude that THI had a constitutionally protected interest in the Property in spite of its gradual submergence under tidally influenced waters, the land described in the deed records no longer exists. The Property, which was first described in an 1896 deed, is situated along the southern boundary of the original Harrell patent, east of a north-south division line called the "Jones Hare line," bounded by the "meanders of Old River." (Pet. App. 89) At the time of trial, the "meanders of Old River" were no longer in existence, and could not be located, because the property was under water. (Pet. App. 91-92) Thus, the Property no longer exists and, for this independent reason, THI has no legitimate claim of entitlement.

CONCLUSION

THI has failed to show the Texas state court's judgment is worthy of review by this Court. The Petition should therefore be denied.

Respectfully submitted,

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(2)

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To The Court Of Appeals Of Texas

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QUESTIONS PRESENTED

I. Whether a Petitioner who knowingly purchases land bounded and submerged by tidally-influenced, navigable waters – after Petitioner has received formal notice, as required by law, that such land is subject to a moving tidal boundary line – may assert a claim for a "judicial taking" when the land was actually eroded and taken away decades before Petitioner's purchase by a combination of natural and manmade forces.

II. Whether a "judicial takings" claim may be asserted by a Petitioner who failed to meet its burden to establish a recognized ownership interest under state law in the claimed land that Petitioner now alleges was taken through the judicial power of the State.

III. Whether a "judicial takings" claim may be asserted by a Petitioner who cannot show that the state court's action constitutes a sudden change in the law that was unpredictable in terms of relevant precedent.

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PREFACE

> "The soil covered by the bays, inlets, and arms of the Gulf of Mexico within tidewater limits belongs to the State, and constitutes public property that is held in trust for the use and benefit of all the people."

Lorino v. Crawford Packing Co., 175 S.W.2d 410, 413 (Tex. 1943).

STATEMENT OF THE CASE

A. Introduction

This case involves tidally-influenced, submerged property in the vicinity of a marine industrial facility used for commercial barge fleeting located within the Port of Houston, Texas, just beyond the northern reaches of Galveston Bay, near the main Houston Ship Channel, Old River, and the San Jacinto River. The general area and the site at issue are shown in the Appendix to this Opposition ("Opp.App.(page)") at Opp.App.1.[1] The parties stipulated that the area is within the tidewater limits of the Gulf of Mexico. 4RR229. Petitioner TH Investments, Inc. claimed

[1] The Petition will be cited as "Pet.(page)." Petitioner's Appendix will be cited as "Pet.App.(page)." The reporter's record will be cited as "(Volume)RR(page)." Pleadings will be cited by volume and page as "(Volume)CR(page)." Common Exhibits will be cited as "CX(number)." The Port Authority's Exhibits will be cited as "PX(number)." Kirby's Exhibits will be cited as "KX(number)." Petitioner's Exhibits will be cited as "TX(number)."

ownership of approximately 27-acres of submerged lands within these tidewater limits in the form of what it refers to as "Tract 1." Petitioner's ownership claim was based upon a non-warranty deed conveyed by the Carter Heirs in 2002, which used the same historical description to describe and identify Tract 1 as that first used in an 1896 deed, even though the tract was located in a dynamic, tidally-influenced environment and bounded by tidewaters.

This case began as a lease dispute between Petitioner and Respondent, Kirby Inland Marine, L.P. ("Kirby"), which had previously held a nominal lease from the Carter Heirs to stave off any potential interference with its barge fleeting operations to the immediate north and east of the historic 27-acre tract. Kirby, disputing that Petitioner held any ownership rights in the submerged lands of the once historic 27-acre tract, involuntarily joined the State of Texas and the Port of Houston Authority of Harris County, Texas (the "Port Authority"). The State was later dismissed since, in 1927, it had conveyed by legislative act to the Port Authority's predecessor (the "Harris County Houston Ship Channel Navigation District of Harris County, Texas," *see* Opp.App.19-20), all of the submerged lands "as now or hereafter located" in the area at issue, including those lands submerged beneath the waters of the Old River and the San Jacinto River. Pet.App.111, Act of April 5, 1927, 40th Leg., R.S., ch. 292, 1927 Tex. Gen. Laws 437, 438.

A seven-day bench trial was held on what became Petitioner's trespass-to-try title claim. The trial court entered detailed findings of fact (which are entitled to deference by this Court)[2] and conclusions of law, and held that Petitioner never owned Tract 1, as ownership had vested in the Port Authority, successor to the State of Texas, as the tract gradually submerged over time below the line of mean high tide. Specifically, the trial court held that the Port Authority owns submerged lands at the site by virtue of the 1927 Act of the Texas Legislature. *See* Pet.App.88-103.

On appeal, the Texas Court of Appeals for the Fourteenth District affirmed the trial court's judgment, concluding in a lengthy opinion that overwhelming evidence supports all of the trial court's fact findings and that ownership of the submerged Tract 1 vested in the Port Authority pursuant to long-established Texas coastal property rules as the land gradually submerged and disappeared beneath the line of mean high tide due to the indistinguishable effects of erosion, subsidence, and other forces. The Court of Appeals affirmed the trial court's rejection of the novel, made-for-litigation survey methods advanced by Petitioner at trial, and agreed that it is no

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[2] *Hernandez v. New York*, 500 U.S. 352, 366 (1991) ("In the absence of exceptional circumstances, we would defer to the state-court factual findings, even when those findings relate to a constitutional issue."); *see also Fry Roofing Co. v. Wood*, 344 U.S. 157, 160 (1952). Petitioner has made no arguments for any such exceptional circumstances, and none exist here.

longer possible to identify the historic 27-acre tract or to unravel the geomorphological and manmade forces that caused it to submerge and disappear.

This is a case wholly grounded in settled Texas coastal property law. There is no split among the federal circuits that is pertinent to the resolution of this case. Nor is there any divergence among Texas authorities as to the governing principles. Both the trial court's findings and the Texas Court of Appeals' opinion were correct in all respects and supported by conclusive, or virtually conclusive evidence, and multiple Texas judicial opinions dating back to 1859. The controlling issue in state court – Petitioner's ownership of land submerged beneath the tidal waters of Texas – was not a federal issue.

No reason exists for this Court to grant certiorari to revisit the validity of the "judicial takings" doctrine because, in this case, Petitioner failed to establish any ownership interest in the submerged lands allegedly "taken." Petitioner cannot undo the trial court's detailed fact findings, affirmed by the Texas Court of Appeals, and cannot demonstrate by citation to Texas authority that the Texas courts departed from prior precedent that caused Petitioner to lose any previously-recognized property rights. The "taking" that occurred here was not by any judicial action, but by a combination of natural and manmade forces, acting gradually and imperceptibly over time, to submerge the historic 27-acre tract fully below the line of mean high tide. Petitioner's effort to avoid the effect of these forces and the moving line of the tide –

which defines the ownership boundary between private uplands and public submerged lands – was grounded in legally indefensible survey methods and a patently erroneous reading of *Coastal Industrial Water Authority v. York*, 532 S.W.2d 949 (Tex. 1976), as more fully discussed herein.

B. Background

Tract 1 has been submerged beneath the tidal waters of Old River and the San Jacinto River for decades. The dramatic evolution of the tract can be seen in a series of photographs that span seven decades. Opp.App.8. The earliest depiction of the site by a 1916 U.S. Geological Survey topographical map shows the area in the shape of a "Rabbit's Head." Opp.App.7. The general area of Tract 1, prominently defined by the meander boundary[3] of Old River, is the "Ear" of the "Rabbit's Head." Today, no such "Rabbit's Ear" or "Rabbit's Head" shape or defined tract can be identified. 6RR61; 7RR236, 244; 8RR73-74; 10RR49;

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[3] A meander boundary, by definition, is the present line where water meets upland. Pet.App.29-33, 98-99; *Kenedy Mem'l Found. v. Dewhurst*, 90 S.W.3d 268, 280 (Tex. 2002) ("A shoreline boundary cannot be determined without water level measurements"). Nedra Foster, the Port Authority's Licensed State Land Surveyor, understood a meander to be the existing, winding boundary of water against upland – a line above water. 9RR170. Because a meander boundary inherently moves and changes over time, it is the present, existing meander line to which a survey or deed refers. Petitioner's surveyor, William Merten, agreed. 5RR124.

Pet.App.91-92. Instead of a "Rabbit's Head," a mud "flat" usually covered by tide waters now exists at the location. 8RR372; 10RR72; Pet.App.92. Petitioner's own photographic exhibits, taken during rare periods of low tide, dramatically illustrate the "featureless flat," and show the absence of any identifiable meander line. TX105; TX170; 10RR71; Pet.App.92. Erosion, evident at the site since 1916, eroded away both the larger "Rabbit's Head" and the smaller 27-acre "Rabbit's Ear," as illustrated by a 1961 aerial photograph. Opp.App.9. Petitioner did not challenge the trial court's finding that the "Rabbit's Head" can no longer be identified (Pet.App.91-92), and Petitioner's own experts admitted that the shape they purportedly surveyed in 2003 materially differs from the historic "Rabbit's Head." 8RR73-74; 7RR236-37.

In 2002, the Carter Heirs attempted to convey title to Tract 1 to Petitioner. Since the property was submerged, the Carter Heirs gave Petitioner only a non-warranty deed. 6RR140; Pet.App.3. Petitioner's deed, and all predecessor deeds dating back to 1896, described Tract 1 as being bounded by a tidal meander boundary, with reference to the "meanders of Old River." Pet.App.89. An "Addendum for Coastal Area Property," included in the Contract of Sale for Tract 1, put Petitioner on formal notice at the time of its purchase that the property was subject to a moving boundary line because it shared "a common boundary with the tidally influenced submerged lands of the state." Pet.App.4-5; Opp.App.5-6. This Addendum is statutorily-required notice to a purchaser that

changes in the moving tidal boundary line could cause the gain or loss of property. *See* TEX. NAT. RES. CODE ANN. §33.135. Opp.App.25-26. The notice also informs the purchaser that Texas law prohibits any encumbrance on or over the applicable tide line, without appropriate permission. *Id.* Despite this formal notice, Petitioner's President neither read the deeds himself nor engaged counsel to do so. 4RR241. The Carter Heirs' representative thought Petitioner "had lost their minds" to pay the agreed purchase price for the tract. 6RR138-39.

Virtually all of Tract 1 was submerged beneath the tidal waters of Old River when the Carter Heirs executed the non-warranty deed to Petitioner. Petitioner admits in this Court that the property was submerged at the time of its purchase. Pet.4 (the "property was almost entirely submerged. . . ."); *id.* at 5 ("chain of title . . . had been transferred numerous times since it became mostly submerged. . . ."); *id.* at 6 ("mostly submerged by shallow water most of the time."). Although the exact date of submergence of the property can never be known, portions of it were intertidal by 1955, and it was submerged since at least 1973. 10RR14-15, 78-79, 140. The only emergent area above mean high tide, referred to as the "little thumb," resulted from self-help activities of Petitioner's predecessors-in-title. Pet.App.93. Petitioner, at the time of purchase, was aware that the land was submerged and that the Port Authority owned lands submerged beneath the San Jacinto and Old Rivers. 4RR231-32.

The Port Authority is a political subdivision of the State of Texas, and was created for the purpose of operating and developing ports and waterways in the public interest. Opp.App.19-20. In 1927, the Texas Legislature conveyed certain submerged lands in Harris County, Texas, to the Port Authority (Pet.App.109-12), including the area of Tract 1:

> . . . all the submerged lands lying and being situated under the waters of . . . San Jacinto River . . . [and] . . . Old River . . . so far up said streams as the State may own same, together with all lands lying and being situated under the waters of Old River . . . and all other tidal flats or overflow land adjacent to or appurtenant to the above-mentioned streams . . . as now or hereafter located. . . .

The waters in the vicinity of Tract 1 have been used for commercial barge fleeting since 1978, and are subject to significant commercial maritime use and occasional recreational use. Pet.App.90. After purchasing bare record title, Petitioner asserted that Kirby's barge fleeting operations were located on and around Tract 1, and then attempted to renegotiate the Carter Heirs' former lease with Kirby. However, after obtaining an assignment of the lease from the Carter Heirs, Petitioner sought a substantial rent increase from Kirby, who balked at the proposed rent increase from $1,000 per month to $35,000 per

month, and advised Petitioner that it was operating over public lands.[4] 5RR37; 1CR153-54; Pet.App.5, 7.

Kirby filed suit against Petitioner to enjoin it from interfering with Kirby's business operations and to obtain a declaratory judgment that the State of Texas – not Petitioner – owned the submerged tract. 1CR2-30. After learning that the State had conveyed all submerged lands in the area to the Port Authority by the 1927 Act, Kirby then involuntarily joined the Port Authority. 1CR47-56; 4CR658.

Contrary to Petitioner's assertion, the Port Authority did not join the suit to establish "its ownership" or "to acquire property without paying for it." Pet.7, 8. Instead, the Port Authority pleaded "only defensively" and disclaimed any intention to take the property of another. 13CR2369.

C. The Decision Below

Although Petitioner did plead a "takings" theory below, it did not move for judgment on that ground, did not adduce any evidence of the value of Tract 1, and did not seek any findings with regard to that claim. At trial, Petitioner assumed the role of plaintiff in its trespass-to-try-title claim (Pet.App.6), bearing

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[4] Whether Kirby's fleeting operation and improvements encroached upon Tract 1 was a disputed issue. The trial court found that Kirby operated to "the north and east of and adjacent to Tract 1." Pet.App.90. As a result, Petitioner did not, as it asserts, succeed to any "leasehold rights." Pet.6.

the burden of proof on three key factual disputes: the location of the tidal meander boundary for Tract 1; the placement of the southern boundary of the tract; and, based on the *York* case, the existence of a "subsidence exception" to the well-established Texas rule that lands submerged beneath tidal waters belong to the State.[5] *York*, 532 S.W.2d at 949.

The trial court held that Petitioner never owned Tract 1, as ownership had vested in the Port Authority, successor to the State of Texas, as the tract gradually submerged below the line of mean high tide. The state appellate court agreed and held that the trial court's judgment did not violate the "takings" clause, reasoning that the property was lost as a result of natural occurrences, like erosion, or natural occurrences acting upon the land in conjunction with manmade causes. Pet.App.43-44.

The Texas Court of Appeals did not, as Petitioner asserts, resolve the issues in this case "principally as a matter of law." Pet.11. Petitioner challenged a number of the trial court's factual findings, and the appellate court both conducted "legal sufficiency" and "factual sufficiency" reviews of the evidence bearing

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[5] By stating that submerged property is abundant in the United States, and that usually it is not worth the trouble to take, Petitioner is admitting that its case is essentially one in which it seeks to remedy a perceived individual injustice. Pet.22 n.11. Whether submerged lands have any value is a highly individualistic determination, varying from parcel to parcel.

on the trial court's findings, and resolved those factual issues against Petitioner. Pet.App.27-40.

Petitioner's failure of proof on fact-intensive state law issues defeats its "takings" claim. The state courts could not have taken from Petitioner property that Petitioner's predecessors-in-title never owned – submerged lands lying below the line of mean high tide. The state courts could not have taken property that could not be located or identified. And, the state courts cannot be said to have strayed from *York* when Petitioner failed to prove that this case involved *York*'s same facts.

REASONS FOR DENYING THE WRIT

Petitioner tries to inflate this case into one presenting "an important question of constitutional law" to entice the Court to revisit the issue of whether state court action affecting property rights can constitute a "judicial taking." Pet.12. While there are unsettled issues regarding the judicial takings doctrine, this case presents the poorest possible candidate for the Court to revisit that doctrine given the compelling evidence demonstrating that Petitioner did not establish a property interest. The record is also clear that the Texas courts decided the case within well-settled legal principles, and that it was Petitioner that sought a radical departure from Texas law.

A petitioner asserting a "taking" must show that it possesses a recognized property interest that may be protected by the Fifth Amendment. *Penn. Cent. Transp. Co. v. New York City*, 438 U.S. 104, 124-25 (1978). As this Court stated in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003, 1030 (1992), "Although the Takings Clauses may secure a right of compensation for the governmental appropriation of private property rights, they do not create or define those rights, which is a matter left to state property law."

Petitioner cannot make that showing because it failed to meet its burden to establish an ownership interest under state law. A fundamental flaw with the Petition is that it simply assumes that Petitioner has an ownership interest that was "taken," when in fact, Petitioner never legally or factually established one under Texas law. If Petitioner did not possess a property interest, then it follows that nothing was taken by subsequent judicial action. This is not a case where Petitioner's ownership rights were "retroactively extinguished" (Pet. 7), but, rather, is a case where Petitioner retroactively seeks to obtain ownership to land that was lost to its predecessors-in-title through the process of erosion and submergence beneath tidal waters.

In every instance where a "judicial taking" has been found, the state court action involved a change in existing property law. In this case, the state courts followed long-standing background principles of Texas coastal property law, dating back over 100

years. The state courts made no change in previously recognized property rights.

Petitioner's briefing in the state courts was largely devoted to advancing a novel ownership theory that directly contradicted decades of Texas coastal land law. In general, this body of Texas law is that a land patent conveying land from the State to private ownership does not convey lands submerged beneath tidal waters, and that the boundary between private uplands and public submerged lands moves over time as the line of the tide moves. This principle is a fundamental limitation on the rights conveyed by the State in the first instance.

Petitioner does not meaningfully address either the facts or the legal analysis that support the Texas courts' conclusion that Petitioner failed to establish ownership of a property right, a matter governed by state law. Petitioner likewise fails to mention the core fact that drives the legal analysis – the fact that the submerged lands at issue lie beneath *tidal* waters, which are owned by the public and affected with the public interest. No rule of Texas coastal property law recognizes Petitioner's ownership of the submerged land at issue. To the contrary, it has been a long-standing tenet of coastal law that "[i]f the sea encroached and the upland owner lost his land, he had no redress. . . ." *State v. Balli*, 144 Tex. 195, 190 S.W.2d 71, 100 (1944).

I. This Case Presents a Poor Vehicle to Address Unsettled Questions about the Existence of a Judicial Takings Doctrine.

A. A Judicial Taking Does Not Occur When the Court's Decision Follows Decades of Established Precedent.

The "judicial takings" doctrine has no application here where there has been no court action that constitutes a drastic change in the law or a rejection of historic precedent. The Texas Court of Appeals followed well-established Texas coastal property law dating back to 1859, which Petitioner was expressly informed of in the transactional documents when it attempted to purchase Tract 1. The Texas courts did not make "new" Texas law. Pet.19.

Where courts have recognized a "judicial taking," the plaintiffs have shown that the state court decision constituted a sudden change in state law that was unpredictable in terms of relevant precedent. For the most part, courts making such "sudden changes" changed the definition of property in a way that caused the property owner to suffer a loss or diminution of their previously-recognized rights. *See Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 162-63 (1980) (the Florida court's decision was contrary to the long-established general rule); *Stevens v. City of Cannon Beach*, 510 U.S. 1207, 114 S.Ct. 1332, 1335 (1994) (Scalia, J., dissenting from denial of petition for writ of certiorari) (the Oregon court announced a "new found" doctrine of custom; the petitioner was never allowed to develop the facts as to

whether the doctrine applied); *Pruneyard Shopping Ctr. v. Robins*, 447 U.S. 74 (1980) (the California court's holding was contrary to prior precedent); *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930) (Missouri court suddenly shifted its view on the appropriate forum for a tax challenge, depriving the taxpayer of any forum); *Muhlker v. N.Y. & Harlem R.R. Co.*, 197 U.S. 544 (1905) (the New York court attempted to abandon its prior precedents); *Robinson v. Ariyoshi*, 753 F.2d 1468, 1473-75 (9th Cir. 1985) (the Hawaiian court radically changed the face of Hawaiian water law). It is sudden changes in the law, unpredictable in terms of relevant precedents, that operate as the device to allow the state to assert "retroactively that the property never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring).

A judicial decision regarding property rights must dramatically depart from settled precedent to operate as a "taking" because the takings clause generally requires payment of just compensation when government action interferes with the investment-backed expectations of the property holder. *See Penn Cent. Transp. Co.*, 438 U.S. at 124. As a result, "judicial takings" have been found in situations in which settled expectations are interrupted. All of Petitioner's cited cases deal with a change in prior law, not the application of well-settled rules.

Here, the Coastal Addendum in the Contract of Sale for Tract 1 put Petitioner on notice that an issue existed as to the extent that the tract, bounded by a

tidal meander boundary, might remain subject to private ownership, and informed Petitioner of long-standing Texas coastal boundary law. As Justice Stewart recognized in *Hughes*, "To the extent that the decision of the [state court] . . . arguably conforms to reasonable expectations, we must of course accept it as conclusive. But to the extent that it constitutes a sudden change in state law, unpredictable in terms of the relevant precedents, no such deference would be appropriate." *Hughes*, 389 U.S. at 296 (Stewart, J., concurring); *see also Lucas*, 505 U.S. at 1028-29 (recognizing in the context of regulatory takings that the government could restrict property use without paying compensation to the owner if the restriction was supported by background principles of state property and nuisance law).

The Texas Court of Appeals' decision follows: (i) long-standing Texas coastal boundary law, (ii) the 1927 Act,[6] and (iii) the Texas Natural Resources Code §§11.012, 33.135. Referring to the leading Texas cases addressing tidal boundaries, the Texas Court of Appeals concluded: "To our reading, the trilogy of *Luttes*, *Rudder*, and *Lorino*, recognized and explained the bright line rules that have long dictated land ownership. And the trilogy of *York*, *Kenedy Memorial*

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[6] The 1927 Act does nothing more than place the Port Authority in the shoes of the State of Texas, which otherwise would own all of the lands lying submerged under tidal waters. 43 U.S.C. §1311. The Act was not a basis for depriving the Petitioner of any property interest, as Petitioner admits. Pet.10.

Foundation, and *Brainard*, reaffirmed these bright line rules." Pet.App.41-42 (citing *Luttes v. State*, 324 S.W.2d 167, 175 (Tex. 1958); *Rudder v. Ponder*, 293 S.W.2d 736, 741 (Tex. 1956); *Lorino*, 175 S.W.2d at 413-15; *York*, 532 S.W.2d at 949; *Kenedy*, 90 S.W.3d at 280; *Brainard*, 12 S.W.3d at 17). In *Kenedy* the Texas Supreme Court stated:

> . . . *stare decisis* is never stronger than in protecting land titles, as to which there is great virtue in certainty. We would be very reluctant to discard a rule determining seashore boundaries that has served as long and satisfactorily as the rule in *Luttes*, thereby upsetting long-settled expectations, and we could not do so absent far more compelling evidence than can be offered here.

90 S.W.3d at 281. The same "bright line" tidal boundary rule was followed in this case. Pet.App.42-43. No unpredictable change in state law occurred in this case. Petitioner's repeated characterization of this case as one of a "retroactive nullification" of its property rights is simply inaccurate.

Given the substantial body of Texas case law, the provisions of the Texas statutes, and the inclusion of the Coastal Property Addendum in Petitioner's Contract of Sale, the record is conclusive that the outcome in this case was well within reasonable expectations. Having neither read the Tract 1 deed, nor engaged counsel to do so, Petitioner could have no legitimate, reasonable expectation of ownership.

Petitioner's suggestion that it relied upon communications with the Port Authority before it purchased Tract 1 (Pet.5) is contrary to the record. Port Authority representatives met with Petitioner only *after* Petitioner acquired bare record title to Tract 1 from the Carter Heirs. 9RR243-46. There is no evidence in the record to support Petitioner's assertion that it "enjoyed [the property rights] for a time until being informed that they never existed." Pet.14. Petitioner signed the Contract of Sale in September 2002 and signed the deed in November 2002. CX48; CX49. Kirby immediately challenged Petitioner's ownership, filing the state court action in March 2003. 1CR2-30. The Port Authority did not recognize any interest of Petitioner in submerged lands for "decades," as Petitioner has alleged. Pet.18.

B. It is Axiomatic that for a Taking to Occur the Petitioner Must Possess a Recognized Property Interest.

What constitutes property and the rights that attach to ownership are primarily a matter of state law. *United States v. Cress*, 243 U.S. 316, 320 (1917); *Wash. Legal Found. v. Mass. Bar Found.*, 993 F.2d 962, 973 (1st Cir. 1993).

> Property interests, of course, are not created by the Constitution. Rather, they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain

> benefits and that support claims of entitlement to those benefits.

Board of Regents v. Roth, 408 U.S. 564, 577 (1972); *see also Stevens*, 114 S.Ct. at 1334 ("As a general matter, the Constitution leaves the law of real property to the States."). Since property rights are defined in the federal system by state law rather than federal law, this Court has held that state court definitions of property raise no federal constitutional issues and this Court lacks jurisdiction to revise such state court definitions. *See, e.g., Demorest v. City Bank Co.*, 321 U.S. 36, 42 (1944); *Broad River Co. v. South Carolina*, 281 U.S. 537, 541 (1930); *Central Land Co. v. Laidley*, 159 U.S. 103, 109 (1895); *see Cress*, 243 U.S. at 320 (discussing a potential taking by the United States of land and water rights and finding that states have the authority to establish for themselves such rules of property as they may deem expedient with respect to streams of water within their borders); *Barney v. Keokuk*, 94 U.S. 324, 337-38 (1876) (assessing a takings case and holding that the question of whether land formed by accretion along the banks of a river between high and low water marks belongs to the state is one to be determined by the courts of the state and from decisions of the highest court of the state).

1. Lands Submerged Beneath the Line of Mean High Tide Presumptively Belong to the State of Texas.

Tract 1 is indisputably within the tidewater limits of the Gulf of Mexico. The trial court found that the water over, around, and in the area of the submerged lands claimed by Petitioner is subject to the ebb and flow of the tide (Pet.App.90), Petitioner stipulated to this tidal influence (*id.*; 4RR229), and every witness at trial who was asked testified that the waters covering and surrounding the property are tidal. 4RR231-32; 6RR58; 7RR45-46; 7RR231, 280; 8RR4-8; 8RR203; 8RR218; 9RR31-32; 9RR121, 150; 9RR344; 10RR15; 10RR36. The site is a "coastal environment," and the waters of San Jacinto and Old Rivers are tidally-influenced estuaries of the Gulf. 10RR36; Pet.App.111, 116.

Long-standing, well-established Texas authority holds that lands submerged under tidal waters – regardless of how shallow the water – are conclusively presumed to be owned by the State, and may only be conveyed out of State ownership by an act of the Texas Legislature. *State v. Lain*, 162 Tex. 549, 349 S.W.2d 579, 583 (1961); *Lorino*, 175 S.W.2d at 413-15; *City of Galveston v. Mann*, 135 Tex. 319, 143 S.W.2d 1028, 1032-33 (1940); *Heard v. Town of Refugio*, 129 Tex. 349, 103 S.W.2d 728, 732 (1937); *Manry v. Robinson*, 122 Tex. 213, 56 S.W.2d 438, 446 (1932); *Landry v. Robinson*, 110 Tex. 295, 219 S.W. 819, 820 (1920); *City of Galveston v. Menard*, 23 Tex. 349, 391, 396-97 (1859); *see also* TEX. NAT. RES. CODE ANN. §11.012(c)

(Pet.App.116). The rule is predicated on the State's public policy to hold lands submerged under tidal waters in trust for all people. *Mann*, 143 S.W.2d at 1033.

Petitioner did not (and could not) contend that the State granted the submerged bed of Old River within the J.T. Harrell Survey to Petitioner's predecessors-in-title in 1845. A grantee of the State of Texas takes dry land to the water's edge, with submerged lands specifically reserved by the State for the public trust. TEX. NAT. RES. CODE ANN. §11.012(b); *City of Austin v. Hall*, 93 Tex. 591, 57 S.W. 563, 565 (1900); *Menard*, 23 Tex. at 396. As the Texas Court of Appeals properly concluded, the boundaries of whatever dry land that was granted within the survey description of the J.T. Harrell Survey ended at the meanders of Old River and the San Jacinto River. Pet.App.29-33.

2. The Boundary Between Public Submerged Tidal Lands and Private Uplands Moves with the Line of the Tide.

The obvious corollary to the rule that a patent from the state does not convey submerged lands, is the rule that the line of the tide is the boundary between State-owned submerged lands and privately owned uplands. In the more than 14 decades since Texas courts first addressed this issue, the State courts have consistently held that as the line of the

tide moves over time, the boundary between State-owned submerged lands and privately-owned uplands moves with it. *See Luttes*, 324 S.W.2d at 175 (line of mean high tide for common law land grants); *Rudder*, 293 S.W.2d at 741 (line of mean higher tide for Spanish and Mexican grants). The same standard applies to tidally-influenced waters in rivers and bays that applies to waters of the Gulf. *See Luttes*, 324 S.W.2d at 173 (applying the line of the tide to determine boundary for landward line of the shore abutting the lagoon known as the Laguna Madre); *Kenedy*, 90 S.W.3d at 280 (applying line of the tide where "seawater inundation is regular, shallow, and somewhat infrequent"); *Crary v. Port Arthur Channel & Dock Co.*, 92 Tex. 275, 47 S.W. 967, 970 (1898) (holding the phrase "waters of the Gulf of Mexico" was "comprehensive" and "sufficiently broad to embrace at least all bays, inlets, and streams upon the gulf coast to the extent to which they are subject to the ebb and flow of the tide"). Under this well-established rule of Texas law, the only way to survey land bounded and covered by tidally-influenced waters is to survey the line of mean high tide. *Kenedy*, 90 S.W.3d at 281. This "bright line" rule of the "tide line" protects both public and private interests by providing a certain and objectively determinable method to delineate the boundary between public submerged lands and private dry uplands. *Id.*

Thus, Texas law is clear that once private upland becomes submerged below the line of mean high tide, ownership then vests in the State. *City of Corpus*

Christi v. Davis, 622 S.W.2d 640, 642 (Tex. Cir. App. – Austin 1981, writ ref'd n.r.e.). This is not some "new" rule of property law – it has been the law of Texas for decades. *See Menard*, 23 Tex. at 396; *Lorino*, 175 S.W.2d at 413-15; *Rudder*, 293 S.W.2d at 741; *Luttes*, 324 S.W.2d at 175. And, it is because of this outcome that Texas requires explicit, written notice to all purchasers of land bordering on tidal waters, pursuant to Section 33.135 of the Texas Natural Resources Code, that the moving tidal boundary is subject to change, just as Petitioner was given notice in this case. Opp.App.25-26.

The reemergence of any dry land (the area referred to by Petitioner as the "little thumb") on Tract 1, which was completely submerged, was the result of self-help activities to build up the land.[7] Petitioner admits that Texas law does not allow a private party to acquire title through self-help that raises dry upland from submerged land lying beneath tidal waters. Pet.12; *see Brainard*, 12 S.W.3d at 19; *York*,

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[7] Dr. Douglas Sherman, the Port Authority's geomorphological expert, testified that the reemergence of "land" at the site was caused by the placement of barges and the dumping of dredged spoils. 10RR111, 137. Without the anchor barges placed by Western Towing beginning in the 1980s that changed the flow pattern of the water and caused the deposit of sediment, Dr. Sherman believed that there would not be any land above mean high water anywhere. 10RR90; *see also* 7RR60-61, 90-91, 93-94; 10RR74, 108; PX12; PX65d. Petitioner's expert, Dr. William Dupre, also identified dredge spoil dumping areas that matched Dr. Sherman's testimony. 7RR198-99, 201.

532 S.W.2d at 952; *Lorino*, 175 S.W.2d at 414; *Natland Corp. v. Baker's Port, Inc.*, 865 S.W.2d 52, 58 (Tex. App. – Corpus Christi 1993, writ denied). In sum, the evidence showed, and the trial court found, that the "little thumb" was not a remnant of the historic 27 acre-tract, but was a manmade bit of land grown out of submerged land by the activities of the lessees of Petitioner's predecessors-in-title. Pet.App.93.

3. Petitioner Could Not Rebut the Presumption of State Ownership of Tidally-Influenced, Submerged Lands by Relying on *York*.

Petitioner sought a new rule of law allowing it to escape the conclusive presumption of State ownership of lands submerged under tidal waters and the rule that ownership of property changes with the movement of the tide line over time. Petitioner pled for a "subsidence exception" – if the submergence of a tract under tidal water was caused by "subsidence," then, Petitioner argued, that the usual rules governing public ownership of submerged lands were to be suspended, entitling Petitioner to ownership of Tract 1. Petitioner relied on *York* to support this novel approach.[8]

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[8] While Petitioner characterizes *York* as one of "a number of precedents under Texas law recognizing private ownership rights in submerged land" (Pet.6), Petitioner fails to address the grounds on which the Texas Court of Appeals distinguished *York*. Pet.App.20-40.

As the Texas state courts found, however, *York* is readily distinguishable from Petitioner's case. First, *York* did not involve lands covered by tidal waters. 532 S.W.2d at 951 n.1. The *York* opinion is clear that if the parties there had argued the legal consequences of the fact that Mr. York's property laid beneath tidal waters, the outcome of the case necessarily would have been different. *Id.* Petitioner boldly over states *York*'s holding in asserting to this Court that the "Texas Supreme Court held [in *York*] that ownership of submerged lands is permissible under Texas water rights law and that the riparian land submerged below the mean high tide line in that case could not be allocated to public ownership without compensation. . . ." Pet.8. In *York*, the court assumed that "the tide has no effect" because the parties did not make "any reference to the fact or legal effect of the tide." 532 S.W.2d at 951 n.1.

Second, the definitive clarity of the cause of the submergence present in *York* is not present in this case. Petitioner sought to understate the role of erosion, and overstate the role of subsidence, in an effort to advance its claim to ownership under *York*. In *York*, however, there was a single cause of submergence – subsidence – but here, there were multiple causes, including erosion, that caused the disappearance of the tract. *Id.* at 954. Subsidence alone could not account for the submergence of Tract 1. 10RR79-80. Dr. Sherman testified: "[I]f subsidence were the only force of change at this site, we would still see that rabbit's head preserved. It would just be deeper."

10RR49; *see* 10RR79. According to Dr. Sherman, "[I]t is abundantly clear that this is a . . . confusing and complicated environment. We see substantial evidence of significant erosion and deposition at this site. We see evidence of subsidence and we see a strong imprint of human activity across most of this site as well." 10RR46. Photographs of the site spanning seven decades show the dramatic evolution. Opp.App.8. Petitioner's expert agreed that various forces impacted the site. 6RR207-08.

The state courts did not hold that erosion "trumps subsidence . . . taking the case out of the *York* rule. . . ." Pet.9. Instead, the courts held that the credible evidence did not permit a determination of the degree to which subsidence or erosion caused the submergence. Pet.App.24-25, 34-40, 91. The inability of Petitioner's witnesses to reconcile the undisputed facts with their theories, the profoundly conflicting evidence as to the role played by subsidence in the submergence of Tract 1, the overwhelming evidence of the erosion of the Old River meander boundary line, and the multiplicity of geomorphological causes impacting the site, all demonstrated that the simplistic use of "subsidence" as a litmus test for an exception to long-standing Texas coastal boundary law is unworkable.

Petitioner's simplistic attempt to reduce the analysis of *York* to "subsidence" versus "erosion" – illustrated by its claim that no set of facts would have mattered to the Texas courts if there was some erosion even minimally responsible for the submergence

(Pet.11) – also overlooks other key facts distinguishing *York* from this case. One, argued below, is that the boundaries of the land in *York* were readily identifiable because they had not eroded and had been preserved through surveys over the years. 532 S.W.2d at 952. Here, the tidal meander boundaries of the property have been obliterated by the effects of erosion and other forces.

Additionally, in *York*, it was the *absence* of evidence of public interest in the site that allowed the court to decide the case on the factually incorrect premise that the water over the submerged property was not tidal. *Id.* at 951 n.1. Once the *York* court made this assumption, all of the policy considerations triggered by the fact of tidal waters were avoided. In this case, contrary to Petitioner's assertions, the public use doctrine is directly implicated because the Port Authority owns the submerged lands for public maritime purposes under the 1927 Act (Pet.18 n.9), and the locale is, in fact, used for marine commerce in the Port of Houston. The state trial court specifically found that the ownership question posed an "issue affecting the public interest in the use and enjoyment of tidally-influenced, navigable waters." Pet.App.99-100. Evidence of public interest in the area is conclusive.

The Texas courts have specifically recognized that *York*'s holding is narrow and limited. *Brainard v. State*, 12 S.W.3d 6, 17 (Tex. 1999); *Davis*, 622 S.W.2d at 643. As a result, the Texas courts correctly held

that the factual elements of *York* were not present as to Petitioner's claim. Pet.App.20-25, 100.

4. Petitioner Could Not Identify the Property Allegedly Taken.

In a Texas trespass-to-try-title case, the general test for determining the sufficiency of a description of land is whether the tract can be identified with reasonable certainty. *Zobel v. Slim*, 576 S.W.2d 362, 369 (Tex. 1978). The test is not whether dirt can be found at the site, but whether the description of record title is so definite and certain upon the face of the instrument itself or other writing referred to that the land can be identified with reasonable certainty. *Wilson v. Fisher*, 144 Tex. 53, 188 S.W.2d 150 (1945); *Osborne v. Moore*, 112 Tex. 361, 247 S.W.2d 398 (1923); *Morrison v. Dailey*, 69 Tex. 287, 6 S.W. 426 (1887). As a trespass-to-try-title plaintiff, Petitioner bore the burden to prove its superior title and the location and identity of the land. Pet.App.94; *Bacon v. Jordan*, 763 S.W.2d 395, 396 (Tex. 1988). Petitioner did not meet this burden.

In its historical description, Tract 1 was bounded by (1) the Jones-Hare line to the east (a vertical, north-south line), (2) the south line of the J.T. Harrell Survey to the south (a horizontal, east-west line), and (3) the meanders of Old River to the north and west. As to the latter boundary line, since no meander line existed in fact, Petitioner sought to identify Tract 1 by

asserting the existence of a fictional underwater meander line.

In his previous surveys involving tidally-influenced areas, Petitioner's surveyor, William Merten, only looked to the line of mean high tide to determine present boundary lines. 8RR80. For this case, Merten created new methods to survey the boundaries of the submerged site. *Id.* First, for the northeastern and northern meander boundary, Merten used an old dredging permit to guide his estimation of the prior, but now nonexistent, meander lines. 8RR36-41, 101; 9RR144. Merten described his methodology as a *hypothetical estimate* of where he believed the historic meander shoreline *should* have been. 8RR38, 112. Kirby's surveyor, Nedra Foster, testified that this is not an accepted or reliable method for a Licensed State Land Surveyor to establish land title boundaries. 9RR144, 154. Second, Merten tried to find the historic northwestern, but now non-existent, meander line by "probing" the submerged land with his feet. Merten described the "probing" as wading through the water while hanging onto a boat – he felt the bottom with his feet, alternately stepping from soft to hard ground, which he assumed to be the former submerged bank of Old River, while taking GPS readings at intervals so that he could connect them and draw a line. 8RR44-47.

Merten's magical thinking in "surveying" the claimed tract is reflected by his assumption that all 27-acres described by the original 1896 deed remained intact – meaning that there had been no

erosion whatsoever of the meander boundary in the 106 years since 1896. Petitioner concedes that this is not the case since it admitted below that erosion and accretion have contributed to a change in the *shape and appearance* of Tract 1. As the court of appeals found, "the determining question here is not whether a surveyor *could* or *did* mark lines for the northern and western 'meander' boundaries of the tract, but whether the surveyor properly surveyed lines bounded and covered by tidally-influenced waters." Pet.App.33 (emphasis in original).

The evidence established, and the Texas courts found, that Merten's probing was unreliable. Pet.App.34, 94. Merten admitted both that he had never used "probing" previously to locate a submerged boundary line (8RR119) and that, "There is [sic] no sources stating that probing is the – is an accepted – accepted method." 8RR184. Merten said that if ten surveyors went out to the area, they would get ten different results if they tried to find his line. 8RR117. Asked at trial, "There is no boundary out there today that someone trying to retrace your steps can find on the river bottom?," Merten responded, "On the river bottom, no." 8RR114.

Foster confirmed that Merten did not follow accepted surveying practices with his "probing." 9RR167. She testified that "you can find the hard and soft [soil] anywhere out there" in the area. 9RR163. The two geomorphology experts agreed. Dr. Sherman opined that Merten's "hard/soft" findings did not indicate the presence of any submerged bank.

10RR103. Dr. Dupre agreed that the land lost by river-related processes "is no longer distinct from the adjacent channel." 6RR219; *see also* 9RR52 (expert Gil Chatagnier who performed a bathymetric survey of the site: "I've never heard of anybody walking in the water and doing a geotechnical investigation.").

Given the existing site, Foster testified that the only proper method to survey the meander boundaries today is to survey the line of mean high tide. 9RR156, 121-22, 170-71, 194. Foster's mean high tide survey (KX2) reflects that the only "upland" (dry land above mean high tide, 9RR148) at the site today is an area less than one tenth of one acre in size. 9RR124-125. This "little thumb" of land is nothing more than a pile of dumped dredge spoils. 7RR198-99, 201.

Petitioner not only failed to establish the boundary that is the "meanders" of Old River, Petitioner also incorrectly located the boundary marked by the south line of the J.T. Harrell Survey. On this issue, Merten essentially ignored prior surveys in 1936 and 1951 by Licensed State Land Surveyors, and instead relied on "record angles" and current GPS technology (5RR124, 137), which he then attempted to justify based upon the course call of the 1838 Harrell Survey "thence east," as meaning due east; however, even Merten's line was not a perfect, straight east-west line. The boundary line, as placed by Merten, conflicted with adjacent surveys in the area. Both the state trial court and the appellate court found as a factual matter that Merten did not use reliable methods to locate

this line, which the trial court placed several hundred feet further north than Petitioner argued.

Without a reliable survey establishing the boundaries of the claimed tract, Petitioner could not locate or identify Tract 1 with reasonable certainty. No "taking" can be established where the alleged property owner cannot identify the land it claims was taken.

C. No Arbitrary Enforcement of the Coastal Boundary Laws Occurred in this Case.

For the first time on appeal, Petitioner argues that the Port Authority's transactions to acquire Carter Kirby Island show that the Port Authority has previously paid private property owners for submerged lands, lands that are "indistinguishable from" or "identical in character" to Tract 1. Pet.8, 18. Petitioner did not raise any of these arguments in connection with its "judicial taking" claim in the state courts. Instead, Petitioner argued below that the Port Authority should be estopped from taking a contrary position in this case, based on its conduct in the Carter Kirby Island transactions from the 1950s and 1970s. The trial court granted summary judgment in favor of the Port Authority on Petitioner's estoppel claim, a ruling that was not appealed by Petitioner. 13CR2391-2496; 22CR4717; Pet.App.103. As a result, at the trial held three months later, very little evidence relating to Carter Kirby Island or the Port

Authority's purchase of it was admitted, and the trial court made no findings of facts and conclusions of law relating to the Carter Kirby Island transactions.

Petitioner has mischaracterized the Carter Kirby Island transactions in its briefing by incorrectly asserting that they evidence the Port Authority's purchase of submerged lands. On July 15, 1950, when the Port Authority contracted to purchase a one-half interest in Tract 1 and the adjoining Carter Kirby Island tract from Mary Niedermeier, the Port Authority's contract of sale and escrow agreement explicitly excluded submerged lands from the transaction and conveyance, providing that,

> Inasmuch as *Buyer [the Port Authority] claims and asserts title to and ownership of all of the submerged land* lying and being situated at mean high tide under the waters commonly known as Lost Lake and other waters tributary to the Houston Ship Channel, *such submerged land is expressly excluded herefrom.*

CX19 (emphasis added). The conveyance contemplated by the contract of sale was also expressly conditioned upon a survey of the identified lands, "excluding such submerged land," and payment for the identified lands was contingent on the performance of a survey. *See id.* Thus, when the Port Authority began acquiring Carter Kirby Island in 1950, Ms. Niedermeier contractually agreed that the Port Authority owned any submerged lands within the

general property description of Carter Kirby Island, and accordingly, such submerged lands were expressly excluded from the Niedermeier transactions.

In 1950 and 1951, Mr. J.S. Boyles surveyed Carter Kirby Island and determined it to be 730.6 acres. He did not, however, survey Tract 1 to the north of Carter Kirby Island. The boundary of Boyles' survey was the line of mean high tide. 10RR378. By 1952, when the parties sought to close the transaction, Tract 1 had not been surveyed and the Port Authority was unable to determine the location or the extent of the lands, if any, above mean high water. 21CR4358; CX44; CX45. Accordingly, the Port Authority did not pay for any acreage of Tract 1, taking only the one-half interest in Carter Kirby Island. The Port Authority had agreed to include both tracts in the 1952 deed "for convenience." *See id.* By 1954, the parties still had not completed the sale with respect to Tract 1 and the Port Authority never took title to any interest that Ms. Niedermeier had in the tract (which, because it was never surveyed, was never determined). Accordingly, the Port Authority agreed to a correction deed, which was expressly made "subject to the terms of said sales agreement of July 15, 1950" (which excluded submerged lands), to clarify that nothing passed in the 1952 deed from Ms. Niedermeier to the Port Authority. CX45; 21CR4358-59, 4406-10.

In 1979, when the Port Authority and the Carter Heirs settled a condemnation action for the other one-half interest in Carter Kirby Island, no part of that

settlement was an attempt by the Port Authority to pay for submerged lands below mean high tide. 10RR350. The intent was for the property description in the condemnation judgment to match the property description in the 1950 sales agreement when the Port Authority purchased the first one-half interest (which had explicitly excluded submerged lands). 10RR370-71. In acquiring ownership of the Island, the issue for the Port Authority was not the fact that the property was "wet," but whether it was submerged below the line of mean high tide. 10RR378. At bottom, there is no evidence in the record that the Carter Kirby Island was submerged below the line of mean high tide at the time of these transactions in the 1950s and 1979, and no evidence that the Port Authority acted inconsistently with its position in this case.

While both Carter Kirby Island and Tract 1 share some of the similar physical boundaries (the line of mean high tide) and physical characteristics, including submergence, no private landowner ever claimed to own submerged parts of Carter Kirby Island. There is no evidence in the record that any private landowner has ever asserted against the Port Authority claims like those made by Petitioner. Petitioner's assertion that the Port Authority took a "new position" in this litigation, which was neither expected nor foreseeable (Pet.18, 21), is not supported by the record.

II. This Case Does Not Warrant Review as a Judicial Takings Case When Natural and Manmade Forces "Took" the Property from Private Ownership, Not an Act of the Judiciary.

As the Texas Court of Appeals correctly found under the facts, a combination of natural occurrences and manmade forces caused the submergence of Tract 1. Pet.App.43-44. The state court merely made a determination as to the scope of property ownership based on the evidence before it. There was no "taking" through any intentional act on the part of the Port Authority or the state courts. A central premise of coastal property law is that tidal meander boundary lines move over time, causing owners to gain or lose property. The moving line of the tidal boundary between public and private ownership has always been an inherent risk in owning coastal lands, a risk conclusively established by decades of precedent. For this reason, Texas has required, by statute, that those purchasing coastal properties be given notice of the risk at the time of purchase. Petitioner was given that statutory notice, which it chose not to read or discuss with counsel. Opp.App.5-6.

Petitioner advanced novel, unsupportable factual claims and sought a radical departure from Texas law in urging a new "subsidence" exception to the rule that the boundary between private and public ownership moves with changes in the line of the tide. The state courts refused to change Texas law, instead applying *stare decisis* to preserve certainty with

regard to land titles. The result here was completely foreseeable under historic precedent and the statutory warning given to Petitioner at its time of purchase. Petitioner was given an adequate level of due process fairness through the statutory notice at the time of purchase, through its opportunity to establish its ownership interest during the seven-day trial of this case, and through its appeal in the Texas state court system.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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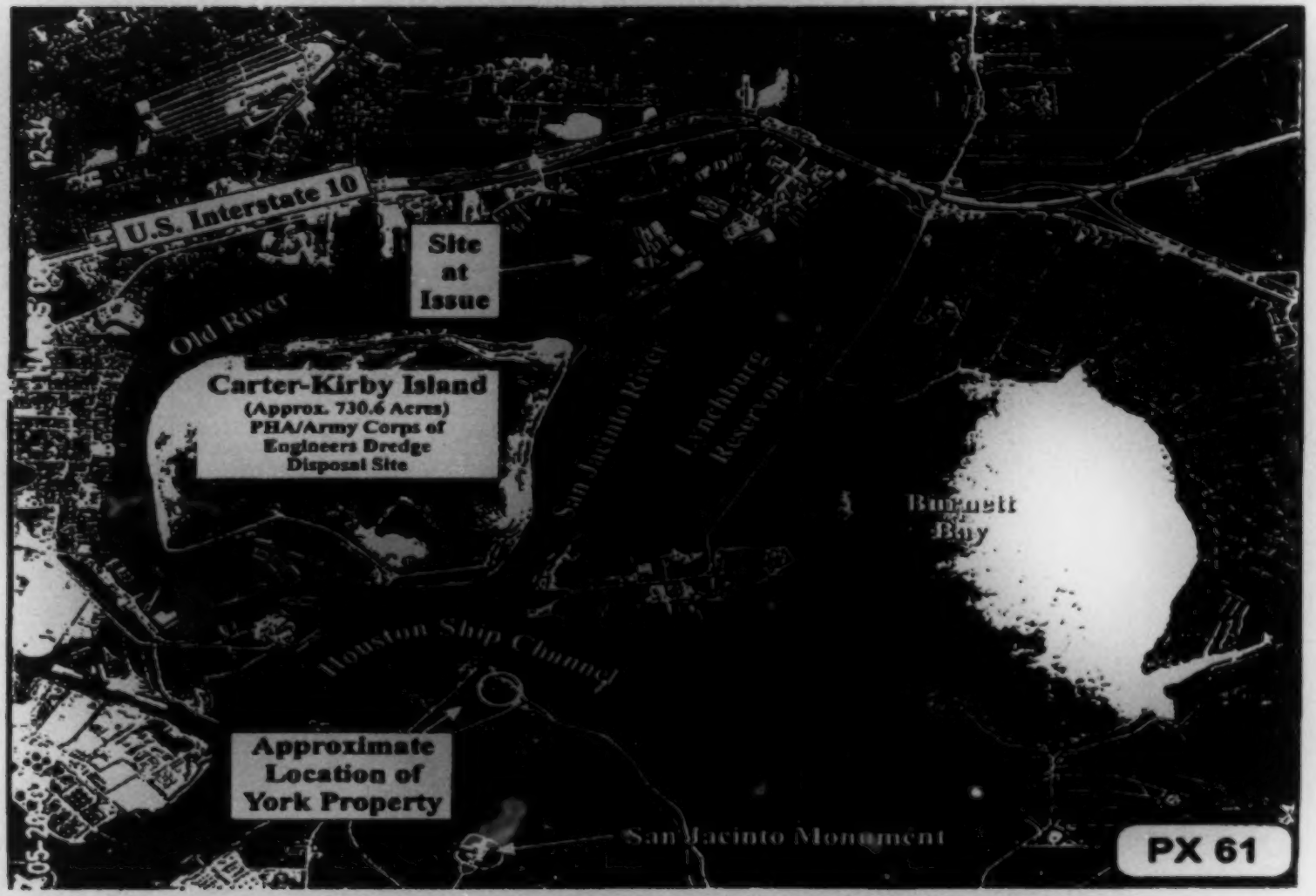
Counsel for Respondent Port of Houston Authority of Harris County, Texas

The Area at Issue



App. 2

[LOGO]

TEXAS ASSOCIATION OF REALTORS®

COMMERCIAL CONTRACT – UNIMPROVED PROPERTY

USE OF THE FORM OF PERSONS WHO ARE NOT MEMBERS OF THE TEXAS ASSOCIATION OF REALTORS® IS NOT AUTHORIZED.

Texas Association of REALTORS® [Illegible]

---

1. **PARTIES:** Seller agrees to sell and convey to Buyer the Property described in Paragraph 2. Buyer agrees to buy the Property from Seller for the sales price stated in Paragraph 3. The Parties to this contract are:

   Seller: Carter Heirs, Severally but not Jointly

   Address: 435 Conti Lane, Victoria, Texas 77904

   Phone: 361-573-1555 Fax: _____

   Buyer: T H Investments, Inc.

   Address: 3302 Ashment Lane, Missouri City, Texas 77459

   Phone: 281-403-9454 Fax: 281-335-1515

2. **PROPERTY:**

   A. "Property" means that real property situated in Harris County, Texas at N/A (*address*) and that is legally described on the attached Exhibit ___ or as follows:

      All of Seller's right, title and interest in the surface only of 27 acres, more or less, described on Exhibit A attached hereto.

Due to the influence of water eroding and sediment building up the shoreline, seller makes no representation as to the actual acreage of the subject property.

B. Seller will sell and convey the Property together with:

(1) all rights, privileges, and appurtenances pertaining to the Property, including Seller's right, title, and interest in any ~~[illegible]~~ [/s/ KSC/MEC], utilities, adjacent streets, alleys, strips, gores, and rights-of-way;

(2) Seller's interest in all leases, rents, and security deposits for all or part of the Property; and

(3) Seller's interest in all licenses and permits related to the Property.

(*Describe any exceptions, reservations, or restrictions in Paragraph 11 or an addendum.*)

3. SALES PRICE:

A. At or before closing, Buyer will pay the following sales price for the Property:

(1) Cash portion payable by Buyer at closing	$_____
(2) Sum of all financing described in Paragraph 4	$500,000.00
(3) Sales price (sum of 3A(1) and 3A(2))	$500,000.00

App. 4

Initialed for Identification by
Buyer /s/ HBC Seller _____

[/s/ KSC/MEC]

[LOGO]

PROMULGATED BY THE
TEXAS REAL ESTATE COMMISSION (TREC)
P.O. BOX 12188], AUSTIN, TX 78711-2188

ADDENDUM FOR COASTAL AREA PROPERTY

ADDENDUM TO EARNEST MONEY CONTRACT BETWEEN THE UNDERSIGNED PARTIES CONCERNING THE PROPERTY AT

Channelview, TX

(Location of Property)

IN ACCORDANCE WITH SECTION 33.135, TEXAS NATURAL RESOURCES CODE, THE FOLLOWING NOTICE IS INCLUDED AS PART OF THE CONTRACT:

NOTICE REGARDING COASTAL AREA PROPERTY

1. This real property described in and subject to this contract adjoins and shares a common boundary with the tidally, influenced, submerged, lands of the state. The boundary is subject to change and can be determined accurately only by a survey on the ground made by a licensed state land surveyor in accordance with the original grant, from the sovereign. The owner of the property described in this contract may gain or lose portions of the tract because of changes in the boundary.

2. The seller, transferor, or grantor has no knowledge of any prior fill as it relates to

the property described in and subject to this contract except: See Exhibit C Special Provisions

3. State law prohibits the use, encumbrance, construction, or placing of any structure in, on, or over state-owned submerged lands below the applicable tide line, without proper permission.

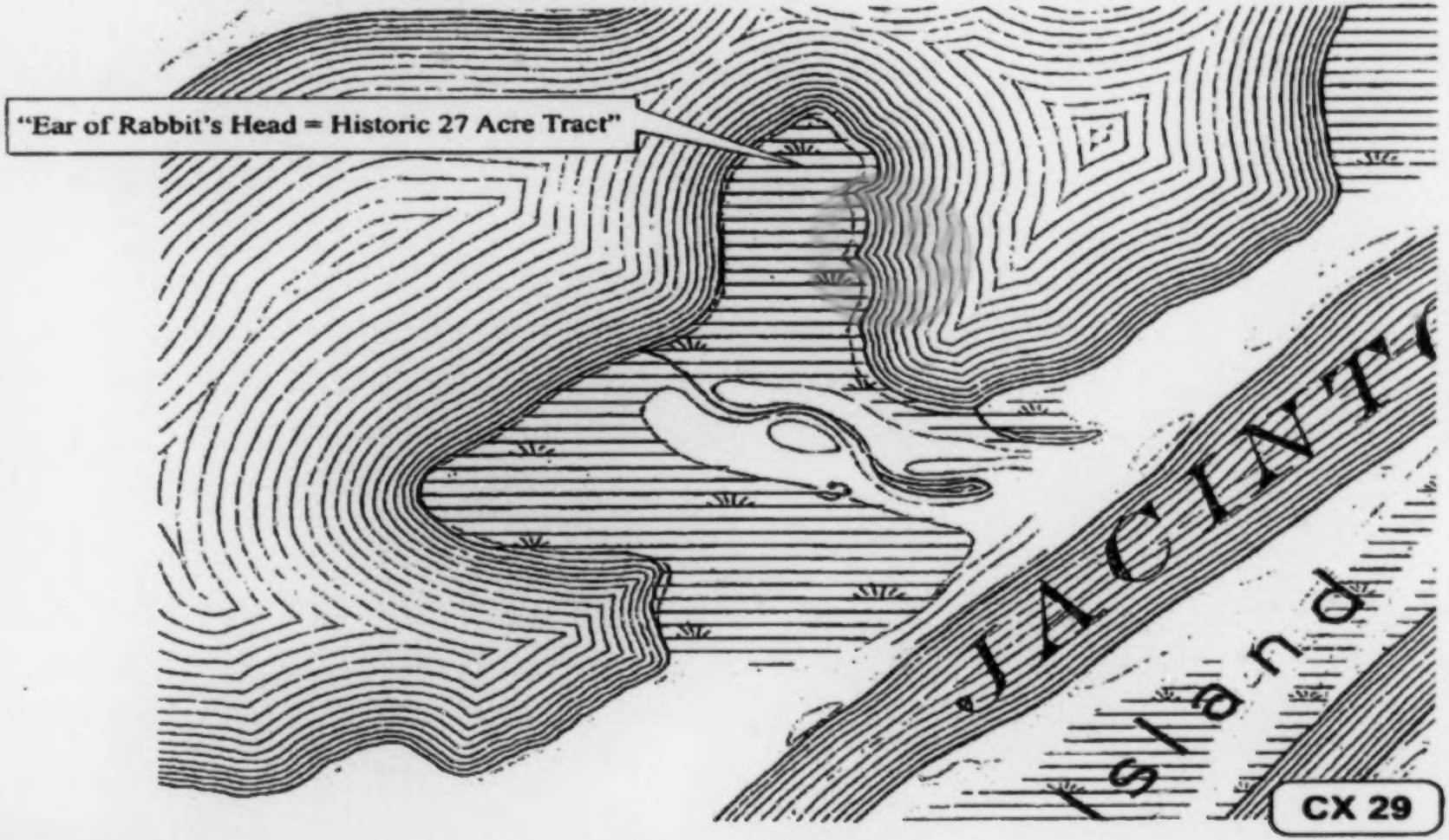
4. The purchaser or grantee is hereby advised to seek the advice of an attorney or other qualified person as to the legal nature and effect of the facts set forth in this notice on the property described in and subject to this contract. Information regarding the location of the applicable tide line as to the property described in and subject to this contract may be obtained from the surveying division of the General Land Office in Austin.

/s/ Bobby L. Henry, Pres.	See attached signature page
Buyer T H Investments, Inc.	Seller Carter Heirs
Buyer	Seller

This form has been approved by the Texas Real Estate Commission for use with similarly approved or promulgated contract forms. Such approval relates to this form only. No representation is made as to the legal validity or adequacy of any provision in any specific transactions. It is not suitable for complex transactions. (12-94) TREC No. 33-0.

App. 7

The 1916 Topographic Map Shows the "Rabbit's Head"



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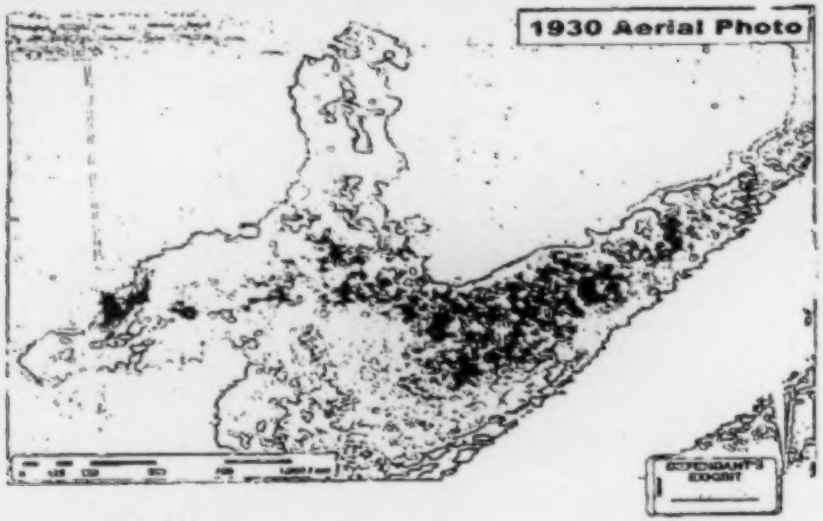
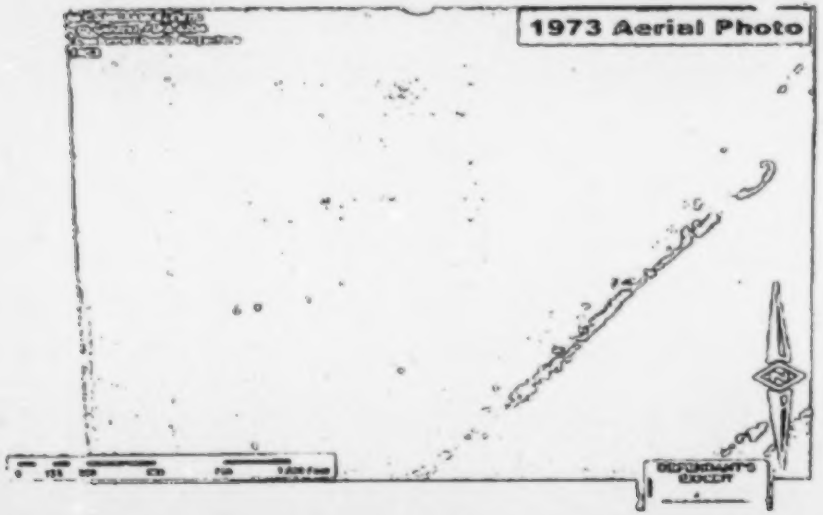

1930 Aerial Photo

1964 Aerial Photo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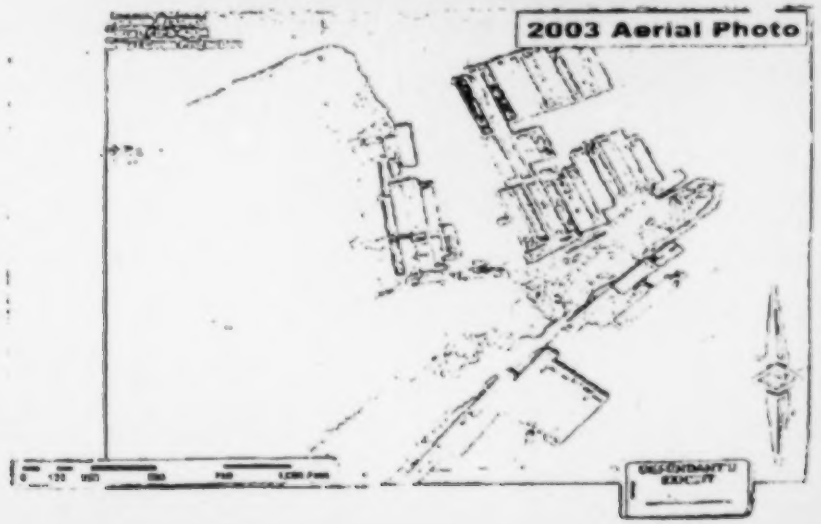
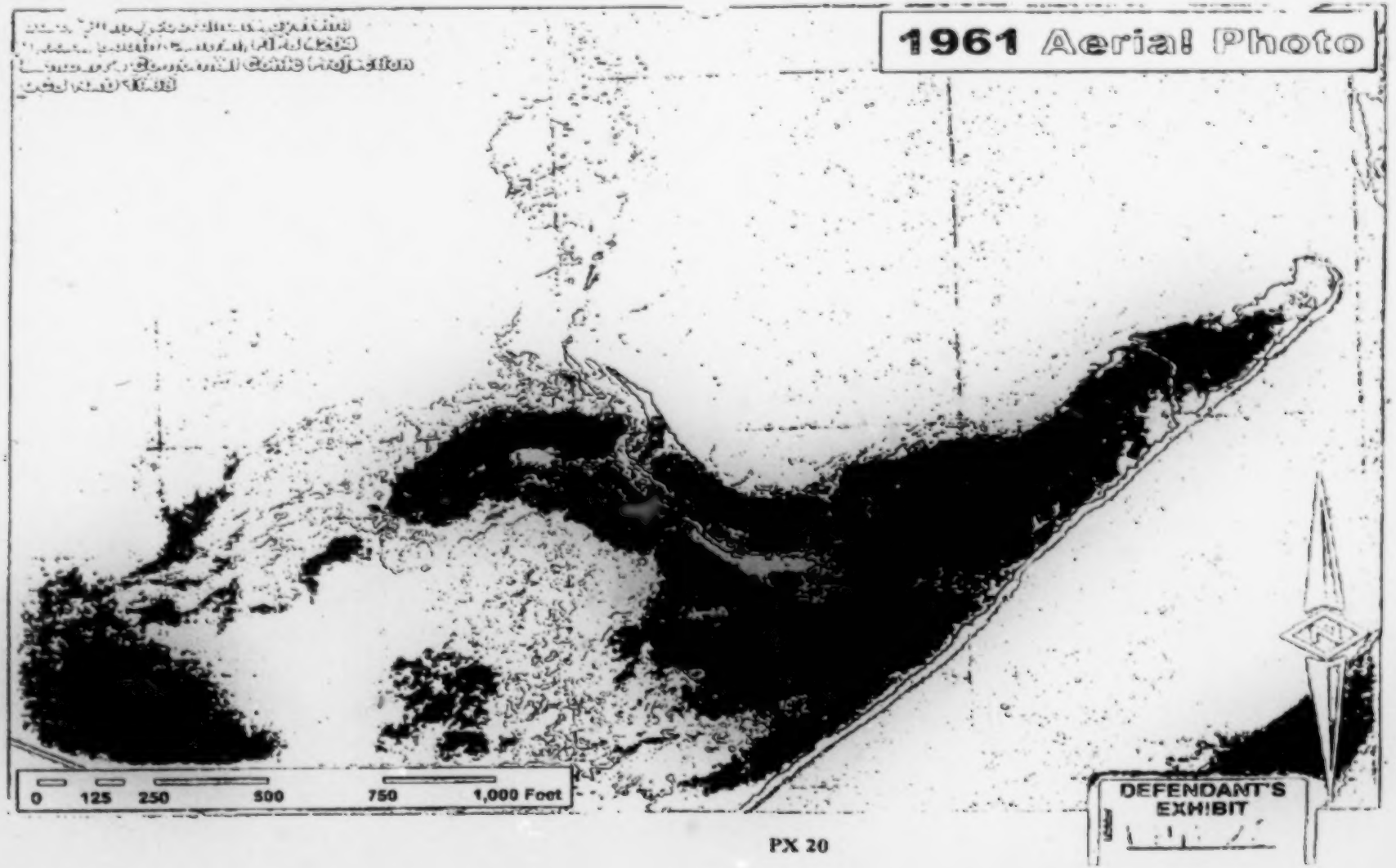

2003 Aerial Photo


1961 Aerial Photo
0 125 250 500 750 1,000 Feet
DEFENDANT'S EXHIBIT

PX 20

THE STATE OF TEXAS

COUNTY OF HARRIS

This contract of sale and escrow agreement made and entered into by and between Mary A. Niedermeier of Marion County, Texas, individually and as Independent Executrix of the Estate of George S. Niedermeier, deceased, acting herein by and through her duly authorized agent and attorney in fact, J. A. Niedermeier, hereinafter called "Seller", and Harris County Houston Ship Channel Navigation District, a navigation district organized and existing under the laws of the State of Texas and domiciled in Harris County, Texas, hereinafter called "Buyer",

WITNESSETH:

1. Subject to the terms, provisions and conditions hereof and for the consideration herein set forth, Seller agrees to sell and convey to Buyer by a good and sufficient general warranty deed executed by Seller and Buyer agrees to purchase from Seller an undivided one-half interest in and to the following described property and premises situated in Harris County, Texas:

> All those certain lots, tracts or parcels of land, lying and being situated in Harris County, Texas on the waters of Buffalo Bayou and San Jacinto River, and being a part of the Eastern half of the Harris and Carpenter League of land and being particularly described as follows:

Commencing on the South line of the J.T. Harrell survey where same intersects the San Jacinto River;

Thence down the West bank of said San Jacinto River with meanderings to Buffalo Bayou at a point opposite Lynchburg;

Thence up Buffalo Bayou with its meanderings to the mouth of Old River at Zavala Point;

Thence up Old River with its meanderings to the South line of the J. T. Harrell Survey;

Thence East with the said South line of the J. T. Harrell Survey to the place of beginning.

ALSO twenty-seven acres of land, more or less out of the South part of the J. T. Harrell survey adjoining the last described tract on the North, which twenty-seven (27) acres, more or less, is fully described in a deed from J. P. McGee to Emma A. Hudson, which is of record in Volume 88, pages 590 et seq., of the Deed Records of Harris County, Texas, and being the same property conveyed to Mary A. Niedermeier, Independent Executrix of the Estate of George S. Niedermeier, deceased by J. R. Andrews, Substitute Trustee, by deed dated January 2, 1934, and recorded in Volume 935, Page 706, Deed Records, Harris County, Texas,

save and except and undivided 1/32 interest (same being 1/4 of the usual 1/8 royalty) in and to the oil, gas and other minerals in and under and that may be produced from the above described land, to be paid or delivered to the said Seller, her successors and assigns, as her own property, free of cost from royalty oil, gas and/or minerals forever, together with the right of ingress and egress at all times for the purpose of storing, treating, marketing and removing the same therefrom, which said interest in and to said minerals is to be a non-participating royalty and is not to participate in the bonus paid for any oil, gas or other mineral lease covering said land nor in any money rentals which may be paid to extend the time within which a well may be begun under the terms of any lease covering said land, and in the event oil, gas and/or other minerals are produced from said land then the said Seller, her successors and assigns shall receive a full 1/32 portion thereof as her own property, to be paid to the said Seller, her successor and assigns free of cost, provided that Buyer, its successors and assigns shall not be required to operate said property for the discovery, development or production of oil, gas or other minerals. Inasmuch as Buyer claims and asserts title to and ownership of all of the submerged land lying and being situated at mean high tide under the waters commonly known as Lost Lake and other waters tributary to the Houston Ship Channel, such submerged land is expressly excluded herefrom.

2. The price at which Seller agrees to sell and convey the aforesaid property to Buyer is to be calculated on the basis of the sum of $137.50 for the full fee simple title per acre, excluding the submerged land mentioned above, (the amount of acreage to be determined as hereinafter set out) to be paid in cash at the time of the consummation of this sale. The land, excluding such submerged land, is to be surveyed by a qualified surveyor agreed upon by Buyer and Seller (the expense of the survey to be shared one-half by Buyer and one-half by Seller) and the consideration is to be paid in accordance with the acreage shown by such survey. Seller is to receive the sum of $68.75 for her undivided half interest in each acre shown by the survey.

3. Seller agrees to furnish Buyer a complete abstract or abstracts of title to the aforesaid property and premises covering time from the sovereignty of the soil down to a date not prior to the date of this contract and duly certified by a reliable abstract company or companies, which will show a good and merchantable title to said property in Seller, and Buyer shall have thirty (30) days after the receipt of such abstract or abstracts within which to have the title examined by the attorney or attorneys of its choice and such attorney or attorneys, after examination, shall write a title opinion with respect to said property pointing out defects therein, if any, and a copy of such title opinion shall be delivered to Seller or to Seller's agent and attorney in fact, J. A. Niedermeier, for observation and attention. Seller shall

have thirty (30) days after receipt of a copy of such title opinion within which to remove or cure any valid objection, if any, that may have been pointed out therein, and Seller agrees to use her best efforts to remove and cure the same within such time limit.

If the abstracts furnished show a good and merchantable title to said property in Seller, or if such objections as may be pointed out in the opinion above mentioned are cured and removed within the period of time allowed for that purpose or if such objections are waived by Buyer, then the parties shall proceed with the consummation of this sale by the execution and delivery on the part of Seller of a good and sufficient general warranty deed, conveying said property to Buyer, but reserving the above described non-participating royalty interest, and Buyer shall be given all of the rights to the above mentioned abstract and Buyer shall then pay the total cash consideration agreed upon herein to Seller.

4. In the alternative, in lieu of abstracts of title, Seller may, if she so elects, within thirty (30) days from the date of the execution hereof, furnish Buyer a certificate of title guaranty upon the authorized Texas form issued by a company duly qualified to issue such title guaranty, and if Seller tenders to Buyer such certificate of title guaranty within such thirty (30) day period, the parties shall then proceed with the consummation of this sale by the delivery of Seller of a good and sufficient general warranty deed conveying said property to Buyer, but reserving the above described non-participating royalty interest,

and Buyer shall then pay the total cash consideration agreed upon herein to Seller.

If the company requested to issue such certificate of title guaranty shall point out any valid title objections, Seller shall have thirty (30) days within which to cure or remove such title objection and Seller agrees to use her best effort to cure or remove the same.

5. If title to said property is good and merchantable of record or is made so within the period of time allowed for that purpose or if Seller tenders to Buyer a certificate of title guaranty as provided herein within the period of time allowed for that purpose and if Seller tenders a good and sufficient general warranty deed to Buyer and complies with the terms of this contract in all respects, should Buyer fail or refuse to consummate the transaction within five (5) days from the date of such tender, then the $5,000.00 earnest money hereinafter mentioned and this day posted by Buyer shall be forfeited by Buyer to Seller as full liquidated damages for the breach and default on the part of Buyer and thereupon all parties shall stand released from any further liability hereunder. On the other hand, if the title to said property is not good and merchantable and is not made so within the time provided for such purpose and if Seller does not tender to Buyer the certificate of title guaranty provided for herein within the period of time allowed for that purpose, and Buyer is unwilling to purchase said property by reason thereof, then Buyer shall have the right to rescind this contract

and shall be entitled to the immediate return of said sum of $5,000.00 posted as earnest money and thereupon all parties shall stand released from this contract. Should Seller for any reason refuse to consummate this sale upon the acceptance of title thereof by Buyer, under the terms and provisions hereof, then Buyer, at its election, may have the right to enforce this contract by specific performance.

6. As evidence of good faith and in earnest of this contract Buyer has placed with the First National Bank in Houston the sum of $5,000.00 to be held by said Bank as escrow agent, along with a signed copy of this contract and subject to the terms and provisions thereof, and upon consummation of this sale, said sum of $5,000.00 shall be applied and used as part of the cash payment of said property.

7. At or prior to the time of the closing of this sale, Seller shall furnish to Buyer official tax certificates showing that all taxes with which said property is charged have been paid in full up to and including the year 1949 and taxes for the current year of 1950 shall be prorated and adjusted between the parties hereto as of the closing of this sale.

8. It is agreed that William A. Bernrieder, a real estate agent of Houston, Texas was the procuring cause of this sale for Seller and that he is entitled to a commission of 5% of the total purchase price payable by Seller, at the time of the consummation of this sale, but that Buyer is to have no responsibility whatever for such commission.

9. This contract shall be binding upon and inure to the benefit of the successors and assigns of the parties hereto.

EXECUTED IN triplicate originals, each of the parties and the aforesaid Bank, as escrow agent, receiving one signed copy this 5th day of July, 1950.

MARY A. NIEDERMEIER, INDIVIDUALLY AND AS EXECUTRIX OF THE ESTATE OF GEORGE S. NIEDERMEIER, DECEASED

By: /s/ J. A. Niedermeier
J. A. Niedermeier, her agent and attorney in fact

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT

By: /s/ W. F. Heavey
General Manager

Approved as to form:

FULBRIGHT, CROOKER, FREEMAN, & BATES

By: /s/ Walter J. Morrison
Navigation District Counsel

HARRIS COUNTY HOUSTON SHIP CHANNEL NAVIGATION DISTRICT CREATED AND RATIFIED.

H. B. No. 131] CHAPTER 97

AN ACT creating and establishing the Harris County Houston Ship Channel Navigation District of Harris County, Texas, under Article 3, Section 52, of the Constitution of the State of Texas, for the purpose of the development of deep water navigation, the improvement of rivers, bays, creeks, streams, or canals within or adjacent to such District, with the power and authority to acquire, purchase, take over, construct, maintain, operate, develop, and regulate wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage, lands, towing facilities, and all other facilities or aids incident to or necessary to the operation or development of ports or waterways within the District and extending to the Gulf of Mexico, provided in Chapter 9, R. S. 1925; describing said District by metes and bounds; ratifying and validating all orders, notices, elections and proceedings of the Commissioners' Court, Navigation Board and Navigation Commissioners and other officers of Harris County and of the Harris County Houston Ship Channel Navigation District of Harris County, Texas; ratifying and validating the original petition for the establishment of said district and all subsequent orders, notices, hearings, etc., had thereon; and ratifying and validating all notices of elections, the elections, returns thereof and all orders with respect to the issuance of bonds, the levying of taxes to create

sinking funds to retire all of the bonds of said District and to pay the interest thereon; ratifying and confirming the petition, election, and results thereof upon the adoption of the special powers for port facilities, conferred by Subdivision 2, Chapter 9, R. S. 1925, and all orders made pursuant thereto by the Navigation Board and the Commissioners' Court; ratifying, confirming, and validating the petition, order of election, notices, election, returns, canvass by the Court of the votes cast at said election, order authorizing the issuance of bonds, and the bonds in the sum of One Million Five Hundred Thousand ($1,500,000.00) Dollars, voted at an election held in said District on December 4, 1926; authorizing the Commissioners' Court and County officers to levy, assess, and collect taxes sufficient to pay interest on such bonds and the principal thereof as they mature; authorizing the Navigation Commissioners to sell said bonds, the Attorney General to register the same; constituting all orders of the Commissioners' Court and orders of the Navigation and Canal Commission, or certified copies thereof evidenced in the Courts, and declaring an emergency.

Be it enacted by the Legislature of the State of Texas:

SECTION 1. That the Harris County Houston Ship Channel Navigation District of Harris County, Texas, in Harris County, as hereinafter described by metes and bounds, is hereby created and established under authority of Article 3, Section 52, of the Constitution of the State of Texas, for the purpose of the development of deep water navigation and the

improvement of rivers, bays, creeks, streams, and canals within or adjacent to such District, and to construct and maintain canals or waterways to permit of navigation or in aid thereof and for the purpose of and authority to acquire, purchase, undertake, contruct, maintain, operate, develop, and regulate wharves, docks, warehouses, grain elevators, bunkering facilities, belt railroads, floating plants, lighterage, lands, towing facilities, and all other facilities or aids incident to or necessary to the operation or development of ports or waterways within said District and extending to the Gulf of Mexico, as provided in Chapter 9 of the Revised Statutes of 1925; and all orders of the Commissioners' Court of Harris County, Texas, and of the Navigation Commissioners, heretofore made in respect to the creation of such District and the authorization and issuance of the bonds of said District and particularly an issue of One Million Five Hundred Thousand ($1,500,000.00) Dollars of bonds voted at an election under date of December 4, 1926, be and the same are hereby in all things ratified, confirmed, and validated. The said Harris County Houston Ship Channel Navigation District of Harris County, Texas, herenow created and established after consideration of the benefits to the property therein located, is described by metes and bounds as follows, to-wit: –

"Beginning at the entrance to Clear Creek into Galveston Bay; thence running up said creek with the line of Galveston and Brazoria Counties to a point on S. G. Haynie's survey 372 varas S. 62 degrees 32

minutes E. from its west line; thence N. 62 degrees 32 minutes W. 12 miles 318 varas to the head of Brays Bayou; thence N. 56 degrees 30 minutes W. 15 miles 1455½ varas to the old crossing of Buffalo Bayou; thence with the line of Waller County in a straight line to the head of creek; thence down the same with its meanders to the San Jacinto River; thence N. 50 degrees east to the western line of Liberty County; thence with said line to the head of Cedar Bayou; thence down said bayou to its mouth; thence following the boundary line of Harris County to the mouth of Clear Creek, the place of beginning."

SEC. 2. Notice of the intention to apply for the passage of this law has heretofore been given in direct conformity with the Constitution and laws of this State and evidence of such notices having been published has been exhibited in the Legislature before the passage of this bill.

SEC. 3. The petition, orders of the Commissioners' Court, notices of election, the election and orders declaring the result thereof and authorizing the issuance of the following bonds: (a) An issue of $1,250,000.00, dated June 1, 1911, bearing 4½% interest, maturing equally each 10 years for forty years; (b) an issue of $250,000.00, dated March 4, 1914, bearing 5% interest, maturing forty years with an option to redeem same at any time after ten years; (c) an issue of $1,500,000.00, dated August 1, 1919, bearing 5% interest and maturing serially in 30 years; (d) an issue of $500,000.00, dated September 15, 1924 bearing 4½% interest and maturing serially

in thirty years; are herenow in all respects confirmed, approved, ratified, and validated, and held to be the legal and binding obilgations of said Harris County Houston Ship Channel Navigation District.

SEC. 4. The petition of the Navigation and Canal Commissioners of October 7, 1926, to the Commissioners' Court asking for an election for One Million Five Hundred Thousand ($1,500,000.00) Dollars of bonds; the order of the Commissioners' Court of October 11, 1926, ordering an election for said bonds for December 4, 1926; the notices of election, the publication and posting of such notices, the form of ballot, the election itself, the canvass by the Court of the votes cast at said election, and the order of the Commissioners' Court dated December 13, 1926, authorizing the issuance of One Million Five Hundred Thousand ($1,500,000.00) Dollars of the bonds of said District, which bonds are dated February 1, 1927, due $50,000.00 each year for thirty years, bearing interest at the rate of 5%, payable semi-annually, said bonds being in the denomination of $1,000.00 each and setting out the form of said bonds, places of payment, rights of redemption and other details of said issue; the order providing for a tax on all of the taxable property in said District sufficient to pay the interest on said bonds and provide a sinking fund for payment of said bonds at maturity; and all orders of the Commissioners' Court supplementary to and amendatory thereof, are in all respects ratified, confirmed, approved and validated.

SEC. 5. The amount of bonds fixed in the order of said Court calling said election for the purposes set forth in said order is hereby found to be proper and necessary for the purposes set out therein and of benefit to all of the property and tax payers in said District, and is hereby approved and authorized, and the said Harris County Houston Ship Channel Navigation District of Harris County, Texas, is hereby fully authorized and empowered to issue and sell said bonds and use the proceeds of said bonds for the purposes set forth in the order of said Court calling said election, and said bonds as and when issued and sold at any time or from time to time shall be and are hereby declared to be the legal, valid, and binding obligations of said Harris County Houston Ship Channel Navigation District of Harris County, Texas. The Commissioners' Court of Harris County, on behalf of said District, is hereby fully authorized and empowered to levy upon and against all of the taxable property in said Harris County Houston Ship Channel Navigation District of Harris County, Texas, liable therefor, in the manner and at the time provided for by the General Laws, sufficient taxes to pay the interest on said bonds and provide sinking funds for the payment of said bonds at maturity.

SEC. 6. The Attorney General of the State of Texas, an presentation to him for approval of any or all of said bonds duly executed as provided by law, in the form set forth in the order referred to, is authorized to approve and certify the same as valid and binding obligations of the said Harris County

Houston Ship Channel Navigation District of Harris County, Texas.

SEC. 7. Harris County Houston Ship Channel Navigation District of Harris County, Texas, is authorized and empowered to issue in direct conformity with the Constitution and the laws of this State as and when necessary such bonds as may be voted from time to time by the requisite two-thirds majority of the resident property tax paying voters voting at any election when called and conducted in direct conformity with the Constitution and laws of Texas and to issue and sell the same subject to such provisions of the Constitution and laws of this State as may be in effect at the time, and subject to the approval of the Attorney General.

SEC. 8. The public importance of the purposes herein contemplated creates an emergency and an imperative public necessity requiring a suspension of the Constitutional Rule requiring bills to be read upon three several days in each House and the said Rule is hereby suspended, and this Act shall take effect and be in force from and after its passage and it is so enacted.

Approved June 6, 1927.
Effective June 6, 1927.

[H. B. No. 131 passed the House 106 yeas, 2 nays; passed the Senate 30 yeas, 0 nays.]

V.T.C.A., Natural Resources Code § **33.135**. Notice to Purchaser or Grantee of Coastal Area Property

(a) A person who sells, transfers, or conveys an interest other than a mineral, leasehold, or security interest in real property adjoining and abutting the tidally influenced waters of the state must include the following notice as a part of a written executory contract for the sale, transfer, or conveyance:

> "(1) The real property described in and subject to this contract adjoins and shares a common boundary with the tidally influenced submerged lands of the state. The boundary is subject to change and can be determined accurately only by a survey on the ground made by a licensed state land surveyor in accordance with the original grant from the sovereign. The owner of the property described in this contract may gain or lose portions of the tract because of changes in the boundary.
>
> "NOTICE REGARDING
> COASTAL AREA PROPERTY
>
> "(2) The seller, transferor, or grantor has no knowledge of any prior fill as it relates to the property described in and subject to this contract.
>
> "(3) State law prohibits the use, encumbrance, construction, or placing of any structure in, on, or over state-owned submerged lands below the applicable tide line, without proper permission.
>
> "(4) The purchaser or grantee is hereby advised to seek the advice of an attorney or other qualified person as to the legal nature and effect of the

facts set forth in this notice on the property described in and subject to this contract. Information regarding the location of the applicable tide line as to the property described in and subject to this contract may be obtained from the surveying division of the General Land Office in Austin."

(b) If property described under Subsection (a) of this section is sold, transferred, or conveyed without an executory contract for conveyance, a written statement containing the notice prescribed by that subsection must be delivered to the grantee for execution and acknowledgement of receipt before the conveyance is recorded.

(c) Failure to include the statement in an executory contract for conveyance shall be grounds for the purchaser to terminate such contract, and upon termination any earnest money shall be returned to the party making the deposit.

(d) Failure to provide this statement prior to closing, either in the executory contract for conveyance or in a separate written statement, shall constitute a deceptive act under Section 17.46, Business & Commerce Code.

(e) This section or the action of any party subject to this section does not diminish or modify the beach access and use rights of the public as acquired by statute or under common law.

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No. 08-270

Supreme Court, U.S.
FILED
DEC 30 2008
OFFICE OF THE CLERK

In The

Supreme Court of the United States

T H INVESTMENTS, INC.,

Petitioner,

v.

KIRBY INLAND MARINE LP and
PORT OF HOUSTON AUTHORITY
OF HARRIS COUNTY, TEXAS,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Texas

PETITIONER'S REPLY BRIEF

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INTRODUCTION AND SUMMARY OF ARGUMENT

This petition for certiorari seeks review of a Texas court judgment abolishing the property rights of TH Investments Inc. ("THI") in approximately twenty-seven acres of land on the eastern tip of Carter-Kirby Island, called Tract I for the purposes of this litigation. THI's rights were extinguished and Tract I was lost to the State without the payment of just compensation as required by the Fifth and Fourteenth Amendments.

Neither the Port of Houston Authority ("Port") nor Kirby Inland Marine ("Kirby") disputes that judicially assisted takings jurisprudence is unsettled and in need of clarification. Both assert, however, that this is the wrong case and they cite three principal arguments to support that conclusion.

First, both the Port and Kirby rely on a "no-rights" fiction. They argue that THI has no property rights in Tract I and thus the Fifth Amendment's protections are not invoked. Second, they rely correspondingly on a "no-property" fiction arguing that because the Texas courts have declared Tract I forfeited to the State, THI possesses no property for which compensation is necessary. Both of these arguments beg the question. The rights flow from the property and takings cases almost always involve an assessment of whether the interest at issue qualifies as property. This case is no different and the fictions do not enlighten the analysis. Third, Kirby and the

Port contend that the outcome of the Texas litigation was completely foreseeable under Texas law, that THI should have known as much, and that this really is a state law case. There was nothing "usual" or "foreseeable" about the lower courts' holdings. The most closely analogous Texas Supreme Court case involving similarly submerged land strongly supports THI's ownership of Tract I.

THI suggests that the Port and Kirby miss the point of the Takings and Due Process Clauses and that this case provides this Court with a proper opportunity to clarify the law in this important area.

ARGUMENT IN REPLY

1. The Fifth Amendment does not exclude from coverage property that is under water. The plain language accords submerged lands the same protection as dry land. Whether the courts of Texas or any state may confiscate a property owner's rights because the property is under water in no way abrogates the federal constitutional obligation of the sovereign to pay for what it took. The no-property and no-rights fictions merit no weight in this discussion. Justice Stewart simply states the obvious when he comments, "for a state cannot be permitted to defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. State of Washington*,

389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Justices O'Connor and Scalia express the same view in *Stevens v. City of Cannon Beach*, 510 U.S. 1207 (1994) (Justices O'Connor and Scalia, dissenting from a denial of the petition for certiorari), as does the Ninth Circuit in *Robinson v. Ariyoshi*, 753 F.2d 1468, 1473 (9th Cir. 1985). Neither the Port nor Kirby has added anything new to this convenient but unpersuasive attempt to avoid the plain language of the Fifth Amendment.

If Texas law requires that the Port take the property, it may do so, but Texas property law only takes this analysis so far. This case has reached the point where the Fifth and Fourteenth Amendments frame the relevant inquiry and Texas law must stand aside. These constitutional provisions require the Port to pay for the property.[1]

2. The fundamental premise of the briefs in opposition is that THI should have known that it was buying property that belonged to the Port under Texas law and that would eventually be confiscated. Accordingly, due process fairness is not implicated and the unforeseeability element accorded importance in the due process calculus in several of this Court's decisions is not present here. It is not clear

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[1] The Port seems to claim that it was dragged into Kirby's lawsuit and was forced to take property it did not want. Nothing in Texas law forces the Port to acquire ownership of Tract I. It could have disclaimed an interest and sided with THI or it could have paid just compensation.

that foreseeability is a necessary factor in a takings analysis, and that question has not been decided directly by this Court, but it is not difficult to conclude that the Takings Clause protects both the clairvoyant and those with less foresight in equal measure. However that might be resolved, the Port and Kirby's ultimate claim of the almost absolute foreseeability of the confiscation of Tract I is not well founded.

For over 160 years, Tract I shows an unbroken chain of continuous private ownership. The Republic of Texas patented this land into private ownership in 1845, and the property has since changed hands many times before and after it became partially submerged. State and local authorities, including the Port, were fully aware of its status and over the years, recorded title, collected transfer fees, levied and collected property taxes, and regulated water traffic around the property. When another part of the Island was condemned by eminent domain, appropriate compensation was paid to the owners.

Tract I in its current state has been in commercial use for thirty years and has produced revenue for its private owners over the period. THI purchased it for $500,000 with an intent to continue the commercial use of Tract I for its own benefit and met with the Port to discuss this continued use before purchasing

the property.[2] The property is not eroded into the deeper adjoining river bed and is simply a sunken island not much more than a foot beneath the surface. On rare occasions, it is dry land. When THI bought the property, its metes and bounds were surveyed by a method typically used in this setting and the deed for the property as described in the survey was recorded and filed to establish THI's ownership. No current or future public use of Tract I has been articulated by the Port.

The unbroken chain of title and the behavior of the Port as well as the State of Texas do not in any way suggest that THI had a basis on which to be concerned that its purchase or ownership of Tract I was in jeopardy.[3]

---

[2] There is a factual dispute in the briefs over when THI met with the Port and obtained advice on how to maximize its use of Tract I. The Port says it occurred after the sale, but the record clearly proves that this meeting took place before the sale. 8 RR 303-313. At the meeting, the Port recommended an engineer for development of the site. *Id.* This is of no great constitutional moment, but it is a fact that merits correction.

[3] The Port and Kirby emphasize that THI was put on notice that it was acquiring coastal property subject to possibly changing boundaries. *See e.g.*, App. 4. This notice is language in a form earnest money contract required by Texas law that advises the purchaser to obtain a survey of the property, to obtain permission if there is an intent to place a structure or encumbrance over water, and that portions of the tract may be gained or lost due to boundary changes. There is no explanation why this routine notice should have been an eye-opener for THI since the notice had nothing to do with subsidence, the land being acquired was riparian not coastal property, similarly situated

(Continued on following page)

Neither do the cases relied upon by Respondents support their conclusions. The principal subsidence case in Texas jurisprudence is *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976). The property in *York* is in the Houston river system not far from Carter-Kirby Island and downstream toward the Gulf of Mexico. The property is at least as much tidally influenced as Tract I. It became shallowly submerged land like Tract I mostly on account of subsidence. The Texas Supreme Court held that the property was not lost to the State, distinguishing submergence due to subsidence from the imperceptible and gradual loss due to erosion or from a "transportation of land beyond the owner's boundary." *York*, 542 S.W.2d at 954. While the Court noted that no one claimed erosion in *York*, there is nothing in the holding to suggest that any erosion at all defeats the rationale for allowing the continued ownership of subsided property. In fact, no Texas Supreme Court decision establishes a hierarchy of criteria such that erosion always trumps subsidence. A reasonable person in THI's position would assume that *York* applied to Tract I and would protect it from governmental

---

property had been conveyed by the Port in submerged condition, this property had been conveyed previously in submerged condition, the property had been properly surveyed to the satisfaction of Texas authorities, and it had been used for commercial fleeting. Had THI consulted counsel, the Texas Supreme Court's decision in *Coastal Indus. Water Auth. v. York*, 532 S.W.2d 949 (Tex. 1976) would seem sufficient to resolve any concerns.

confiscation based on both historical behavior and legal principle. The rule announced in this case by the Texas appellate court holding that as a legal matter any erosion supersedes even massive subsidence and will inevitably result in forfeiture is brand new. The dispositive proposition relied upon by the lower courts in this case is stated in no prior Texas Supreme Court holding and there is no compelling reason to have anticipated this new rule.

Neither do the leading Texas cases, cited by the courts below and the parties, detract from this observation. The most often cited cases involve littoral, beach or bay front property that was newly formed and not previously a part of the parcels belonging to adjacent land owners. When the adjacent land owners tried to claim the new lands for themselves, the state interceded and prevailed in claiming state ownership. Nothing was taken because the property they bought and owned did not include the properties they wanted to annex. *See Luttes v. State*, 324 S.W.2d 167 (1958) (involving newly emergent sea coast land); *Lorino v. Crawford Packing Co.*, 175 S.W.2d 410 (1943) (involving new land created by the long term deposit of oyster shells on the sea bed); and *Rudder v. Ponder*, 293 S.W.2d 736 (1956) (involving untitled land). *See* Pet. App. 41-42 (referring to these cases as a "trilogy" of leading cases).

In none of these cases did the state take titled property belonging to the private owner and in none of them does the Texas Supreme Court authorize the taking of private land, wet or dry, without just

compensation. To suggest that the outcome for THI was foreseeable or that THI is the victim of its own inattention is not supported at all. An outcome that has never happened is not usually foreseeable.

3. This case clearly implicates Fifth and Fourteenth Amendment questions. THI bought Tract I and set out in good faith to put it to commercial use, as many before had done. The Port with the assistance of the Texas courts confiscated the property depriving THI of the use and benefit of it without paying just compensation. That outcome is prohibited by the Takings and Due Process Clauses.

Whether the no rights/no property fictions that control the outcome in this case are appropriate judicially created exceptions to the plain language of the Takings and Due Process Clauses are important and unresolved questions that merit this Court's attention.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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